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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE F. GRODE, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner

V.

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, USAA ANNUITY AND LIFE INSURANCE COMPANY a Texas Stock Insurance Company,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether rejection of abstention under the doctrine of Younger v. Harris, 401 U.S. 371 (1971), on the sole basis that a state administrative tribunal has no power to address constitutional claims conflicts with Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., No. 85-488 (June 27, 1986), in light of the fact that, in Pennsylvania, a party to the state administrative proceeding may raise constitutional issues on appeal to a court.

2. Whether abstention under the doctrine of Railroad Commission v. Pullman, 312 U.S. 496 (1941), is inappropriate because, despite the existence of an unsettled question of state law which could pretermit the constitutional

questions, one of the challenges is a preemption claim and the plaintiff claims that its business reputation will be injured by an adverse state administrative ruling.

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IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1986
NO.

GEORGE F. GRODE, Insurance
of the Commonwealth of Pennsylvania,
Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION
A Texas Reciprocal Interinsurance
Exchange, USAA CASUALTY
INSURANCE COMPANY, a Texas stock
Insurance Company, USAA
LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,
USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The Attorney General of the Commonwealth of Pennsylvania, on behalf of petitioner, George F. Grode,[1] hereby petitions for a writ of certiorari

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[1]This action was filed against William J. Muir, III, Acting Insurance Commissioner in his official capacity. Mr. Grode succeeded Mr. Muir and he is substituted as petitioner pursuant to Rule 40.3 of the rules of this Court.

to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 39a-86a) is reported at 792 F.2d 356. The opinion and order of the District Court (Pet. App. 1a-38a.)are not reported.

STATEMENT OF JURISDICTION

The Court of Appeals filed its opinion on June 6, 1986. On August 22, 1986, a 30-day extension of time to file this petition for writ of certiorari was granted by the Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 641 of the Pennsylvania Insurance Act of 1921, as amended, Pa.Stat.Ann. tit. 40, § 281 (Purdon Supp. 1986), provides:

> Lending institutions, public utilities and holding companies not to be licensed
>
> (a) As used in this section:
>
> (1) "Lending Institution" means any institution that accepts deposits and lends money in the Commonwealth of Pennsylvania, including banks and savings and loan associations, but excluding insurance companies.
>
> * * * *
>
> (4) "Bank Holding Company" shall mean and include the definition of such term in section 2 of an act of Congress entitled the "Bank Holding Company Act of 1956," as amended:

provided, however, that if on or before the effective date of this act, a bank holding company has been granted an exeemption by the Board of Governors of the Federal Reserve System pursuant to section 4(d) of the Bank Holding Company Act of 1956, as amended, such bank holding company shall not be held to be a bank holding company within the meaning of section 2 of the Bank Holding Company Act of 1956, as amended.

(7) A "savings and loan holding company" shall mean and include the definition of such term as defined in Title 12, United States Code, section 1730(a)(1),(d), (e),(f), 12 U.S.C. 1430a.

* * * *

(b) No lending institution, public utility, bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing, or officer or employe thereof, may, directly or indirectly, be licensed or admitted

as an insurer or be licensed to sell insurance in this State either as a broker or as an agent except that a lending institution or bank holding company, subsidiary or affiliate of a lending institution may be licensed to sell credit life, health and accident insurance and to sell and underwrite title insurance in accordance with regulations promulgated by the Insurance Commissioner.

(c) The Insurance Commissioner is authorized to promulgate regulations in order to effectuate the purposes of this section, which are to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies agents and brokers.

STATEMENT OF THE CASE

This is a civil rights action in which the respondents (plaintiffs below) challenged a provision of Pennsylvania's insurance laws as being violative of the Commerce, Due Process, Equal Protection, and Supremacy Clauses of the United States Constitution. On motions filed by petitioner (defendant below), the District Court dismissed the suit on abstention grounds. The Court of Appeals reversed.

1. United Services Automobile Association (USAA) is a reciprocal interinsurance exchange organization domiciled in San Antonio, Texas.[2] It

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[2]In a reciprocal interinsurance exchange,

(FOOTNOTE CONTINUED ON NEXT PAGE)

has been licensed by the Pennsylvania Department of Insurance (Department) to sell insurance in Pennsylvania since 1950.

In April of 1983, USAA Financial Services Company, a wholly owned subsidiary of USAA, applied for and received from the Federal Savings & Loan Insurance Corporation (FSLIC) permission

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(FOOTNOTE CONTINUED)

> individuals, partnerships, or corporations engaged in a similar line of business undertake to indemnify each other against a certain kind or kinds of losses by means of a mutual exchange of insurance contracts. . . whereby each member separately becomes both an insured and an insurer with several liability only.

2 Couch on Insurance, §18:11 at 614-15 (2d ed. 1984).

to organize and operate the "USAA Federal Savings Bank" (Bank) in San Antonio, Texas. The Bank also received permission from the FSLIC to serve as a unitary savings and loan holding company.[3] The Bank does not solicit deposits from Pennsylvania residents and does not do business in Pennsylvania.

The Pennsylvania Insurance Department Act of 1921 provides at Section 641:

> Lending institutions, public utilities and holding companies not to be licensed

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[3]Pennsylvania law, Pa. Stat. Ann. tit. 40, §281 (Purdon Supp. 1986), adopts the federal law definition of "savings and loan holding company" which provides: "any company which directly or indirectly controls an insured institution or controls any other company which is a savings and loan holding company by virtue of this subsection." 12 U.S.C. §1730 a(1)(D).

(a) As used in this section:

(1) "Lending institution" means any institution that accepts deposits and lends money in the Commonwealth of Pennsylvania, including banks and savings and loan associations, but excluding insurance companies.

* * * *

(b) No lending institution, public utility, bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing, or officer or employe thereof, may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State either as a broker or as an agent except that a lending institution may be licensed to sell credit life, health and accident insurance and to sell and underwrite title insurance in accordance with regulations promulgated by the Insurance Commissioner.

(c) The Insurance Commissioner is authorized to promulgate regulations in order to effectuate the purposes of this section, which

> are to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers.

Pa. Stat. Ann. tit. 40, §281 (Purdon Supp. 1986)(Act). The Department interprets Section 641 as requiring USAA to divest itself of ownership in the Bank.[4]

In attempting to convince the Department that it was not violating state law, USAA contended that Section 641 is ambiguous, and, if subsections (a)(1), (b) and (c) are read together,

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[4]The Department first questioned USSA's ownership of the Bank on July 3, 1986, and the legal staff of the Department formally communicated its position to USAA in writing on August 27, 1984. Court of Appeals Appendix (hereinafter "C.A. App.") at 39a-41a.

it becomes clear that sub-section (b) requires only that USAA, as an insurer, divest itself of ownership if the Bank does business in Pennsylvania. Because the Bank does business only in Texas, it was USSA's position that Section 641(b) did not apply and it need not divest itself of ownership of the Bank. See Pet. App. 12a.[5]

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[5]USAA's position was set forth in detail in an October 29, 1984 letter from USAA's counsel to the Department's chief counsel, a portion of which provides:

> We understand that the Department's concerns are based on an interpretation of Section 641 of the Insurance Department Act of 1921, as amended (40 Pa.C.S.A. §281) (hereafter "Section 641"), which holds that a foreign insurer transacting business in Pennsylvania may not be affiliated directly with a bank, even though the deposits, loans and operations of the bank have no nexus with the Commonwealth of Pennsylvania.

(FOOTNOTE CONTINUED ON NEXT PAGE)

2. Because the Department continued to maintain that USAA's ownership of the Bank violated Section 641, USAA, along with three of its subsidiary insurance companies, filed suit in the United States District Court for the Middle District of Pennsylvania on November 27, 1984, against the Acting Insurance Commissioner (Commissioner) seeking to enjoin the Department from revoking USAA's license to insure persons in Pennsylvania. Pet. App. 4a.

(FOOTNOTE CONTINUED)

> In our opinion, as discussed below, Section 641, properly interpreted, does not prohibit the indirect affiliation between USAA, a Texas-domiciled insurer, and a federal savings bank whose activities are strictly localized in San Antonio, Texas. Moreover, any interpretation of Section 641 that would prohibit USAA's affiliation with the Bank in this case would, on well-established standards, violate the United States Constitution.

C.A. App. at 45a-50a.

Alleging a cause of action under 42 U.S.C. § 1983, USAA contended that the Department's interpretation and application of Section 641 violated the Commerce, Supremacy, Due Process and Equal Protection Clauses of the United States Constitution. Pet. App. 20a, 50a.

On December 24, 1984, the Commissioner moved either to dismiss the complaint or stay the proceedings on abstention grounds. On that same date, the Department, through its legal staff, issued an "Order to Show Cause" directing USAA to appear at an administrative hearing to determine whether or not it was in violation of Section 641(b). USAA opposed the abstention motion, and in addition, on January 25, 1985, filed a

motion for summary judgment on preemption (Supremacy Clause) grounds.[6]

3. On September 30, 1985, the District Court dismissed the action on abstention grounds. Pet. App. 38a. In so doing, the court concluded that abstention was appropriate under each of the doctrines enunciated by this Court in Younger v. Harris, 401 U.S. 37 (1971); Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941); and Burford v. Sun Oil Co., 319 U.S. 315 (1943). Pet. App. 1a-38a.

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[6]USAA contended that Section 641(b), as applied to it, violated the Supremacy Clause because (1) Congress has occupied the entire field of regulating federal savings banks and (2) Section 641(b) was in actual conflict with federal law; namely the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. § 1461 et seq., and the National Housing Act, as amended by the Savings and Loan Holding Company Amendments of 1967, 12 U.S.C. §§ 1730, 1730a.

The Court based its conclusion that Younger abstention was appropriate on three findings: (1) there was a "pre-existing state administrative proceeding," Pet. App. 33a; (2) Pennsylvania had a substantial interest in regulating the insurance industry, as recognized by Congress in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1105, and therefore Pennsylvania's interest in going forward with its administrative proceeding was "sufficiently weighty" to justify abstention, Pet. App. 34a; and (3) USAA had an adequate forum to raise and vindicate its federal claims through Pennsylvania's state court system. Pet.App. 35a.[7]

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[7]Under Pennsylvania law, a proceeding to revoke or suspend an insurer's license is commenced with an order to show cause. The matter is assigned to a Department hearing officer

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

and the parties (i.e., the prosecutorial staff of the Department and the insurer) present their respective cases to the officer. The officer submits a recommended adjudication and order to the Commissioner who may either accept, reject or modify the officer's recommendation. This is precisely what has happened in this case. An order to show cause was issued in December of 1984; after various preliminary matters were resolved, two days of hearing were held before a hearing officer on November 14-15, 1985; post-hearing briefs were submitted in February and March of this year; and the parties are presently awaiting the Commissioner's determination.

If the determination is adverse to USAA, it may file an appeal as of right to the Pennsylvania Commonwealth Court, 42 Pa.Cons.Stat. § 763, Pet. App. 92a-93a, and an appeal by allowance from an adverse Commonwealth Court decision to the Pennsylvania Supreme Court, 42 Pa.Cons.Stat. § 724, Pet. App. 92a. In addition, pending its appeals, USAA may apply for a stay or supersedeas of any adverse determination by the Commissioner. See Rule 1781, Pennsylvania Rules of Appellate Procedure, Pet. App. 90a-92a.

The District Court held also that Pullman abstention was appropriate. In reaching this result, the Court concluded that the case was "one in which there is clearly an unsettled and potentially dispositive issue of state law." Pet. App.12a. It further held that resolution of the state law issue in favor of USAA (i.e., Section 641(b) does not apply to USAA because the Bank does not do business in Pennsylvania) would obviate the need to reach USAA's constitutional claims. Pet. App. 16a. Finally, the Court concluded that the state statute in question was part of a comprehensive insurance regulatory scheme implemented under the power granted by Congress to the states under the McCarran-Ferguson Act, and therefore considerations of comity dictated that interpretation of

the statute be left, in the first instance, to "the state administrative machinery and eventually, through appeals, to the state court system." Pet. App. 17a.[8]

The District Court concluded finally that Burford abstention was proper. Citing Colorado River Water Conservation District v. United States, 424 U.S. 800, 814 (1976), the court held that the case involved "difficult questions of state law bearing on policy

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[8]The District Court rejected USAA's claim that it would be prejudiced by any adverse determination by the Commissioner. It did so because of the appellate remedies (including supersedeas) available to USAA. Pet. App. 19a. The court also rejected USAA's contention that, because one of its several constitutional claims was based on the Supremacy Clause, Pullman abstention was inappropriate. Pet. App. 20a.

problems of substantial public impact whose importance transcends the result in the case then at bar." Pet. App. 23a.

The court found that the policies implemented by Section 641 are "essentially state policies developed to protect state citizens and implement state concerns." It further concluded that, if the state procedure is permitted to run its course up through the state Supreme Court, "the state itself will have an opportunity to interpret and mold its own policies in this area of significant state concern, while at the same time, the federal question will be preserved for ultimate review by the United States Supreme Court, if necessary." Pet. App. 27a.[9]

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[9] The court rejected USAA's contention that the "business of insurance," as governed by the McCarran-

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The District Court chose to dismiss (rather than stay) USAA's federal claims because the "state administrative and court systems provide an opportunity for USAA to raise all of its claims and because successful pursuit of those claims in the state system will afford USAA all of the relief it requested from" the federal court. Pet. App. 36a.

(FOOTNOTE CONTINUED)

Ferguson Act, was not at issue. As the court reasoned: "[E]ven if § 641 does not directly regulate an integral part of the policy relationship between the insurer and the insured, Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129 (1982), the policies behind § 641 and designed to be implemented by § 641 may have everything to do with the relationship between insurers and insured. Formulation and implementation of such policies are strictly the province of the state's legislative and administrative bodies." Pet. App. 28a.

4. Affirmance by the Court of Appeals of any of the District Court's three bases for abstention would have permitted Pennsylvania's state courts to interpret Section 641 in the first instance and thus possibly obviate the need to address USAA's federal constitutional claims. However, the Court of Appeals held that none of the abstention doctrines were applicable and therefore remanded the case to the District Court to dispose of USAA's claims. Pet. App. 37a.

The Court of Appeals agreed with the District Court's analysis of Younger in all respects with one exception. It held that, because the administrative agency (i.e., the Insurance Department) did not have the authority to address USAA's federal constitutional

claims, its administrative proceeding was not a part of the "state judicial process" for purposes of Younger abstention. Pet. App. 77a-78a. On this basis alone, the Court of Appeals rejected the applicability of Younger abstention.

The Court of Appeals agreed that the state law question involving the interpretation of Section 641 was "unsettled," but nevertheless rejected abstention under Pullman for two reasons. First, although the Commissioner agreed to expedite the state proceedings and further agreed to a stay of any administrative order in the event of a decision adverse to USAA until the appellate judicial proceedings were completed, the court concluded that the "threat" of a license revocation was of such magnitude

that abstention would be improper.[10] The court also concluded that USAA's Supremacy Clause claim did not pose a "substantial federal constitutional claim" as required for Pullman abstention. And, although the Supremacy Clause claim was only one of several constitutional claims raised by USAA, it was "easily separable" from USAA's other claims and thus dictated against abstention. Pet. App. 67a.[11]

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[10]Only two of the three panel members joined in this rationale. Judge Becker, noting that the harm to USAA was not especially significant, concluded that the majority's holding on this issue "may have dangerously broad implications" because it creates a "precedent that could allow virtually any litigant faced with relatively complex state litigation to avoid the application of the Pullman abstention doctrine." Pet. App. 79a.

[11]At the time of the filing of this petition, the District Court has pending before it USSA's motion for summary judgment based upon its Supremacy Clause claim.

Finally, the Court of Appeals reversed the District Court's finding that Burford abstention was proper. The court concluded that (1) Section 641 did not involve the "business of insurance" under McCarran-Ferguson, (2) no complicated regulatory scheme was at issue, (3) the interpretation of Section 641 did not require consideration of any other Pennsylvania statute, and (4) no local conditions or special expertise was required to interpret the statute. Pet. App. 68a-73a.

REASONS FOR GRANTING THE WRIT

1. The principles applied by the Court of Appeals in rejecting abstention under the Younger doctrine are in direct conflict with those endorsed by this Court in Ohio Civil Rights Commission, et al. v. Dayton Christian Schools, Inc., et al., No. 85-488 (June 27, 1986)

The Court of Appeals reversed the District Court's holding that Younger abstention was proper for one reason only - USAA could not raise constitutional claims during its administrative proceeding before the Insurance Department, and therefore that proceeding was not a part of the state's judicial process for Younger purposes. Pet. App. 77-78a. But, in Ohio Civil Rights Commission, et al. v. Dayton Christian Schools, Inc., et al., No. 85-488 (June 27, 1986), this Court expressly rejected the rationale employed by the Court of Appeals.

In Dayton, this Court specifically held that Younger abstention is appropriate so long as the "constitutional claims may be raised in state court judicial review of the administrative proceeding." Slip op. at 8-9. USAA did not, nor could it, argue that it has no right of appeal from an adverse determination to the Pennsylvania state courts and that those courts, on appeal, may not consider constitutional claims. Indeed, state law specifically obligates Pennsylvania's appellate courts to decide whether an agency's determination is "in violation of the constitutional rights of the appellant...." 2 Pa. Cons. Stat. § 704. See Pet. App. 89a-90a. "A party who proceeded before a Commonwealth agency under the terms of

a particular statute shall not be precluded from questioning the validity of the statute in the appeal. . . ." 2 Pa. Cons. Stat. §703(a), Pet. App. 89a.

Because the decision of the Court of Appeals is in direct conflict with this Court's decision in Dayton, summary reversal is appropriate. At least, this Court's review is justified.

2. The decision of the Court of Appeals rejecting Pullman abstention is a significant departure from principles previously enunciated by this Court, conflicts with the decisions of other Circuits and creates a dangerously broad exception to the doctrines of abstention.

Federal courts should not adjudicate the constitutionality of state enactments fairly open to more than one interpretation until the state courts have been afforded a reasonable opportunity to pass upon them. Harrison v. N.A.A.C.P., 360 U.S. 167, 176 (1959). Indeed, the underlying basis for Pullman abstention is the desire to avoid both unnecessary adjudication of federal questions and needless friction with state policies. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984), citing Pullman, supra, 312 U.S. at 500.

The Court of Appeals acknowledged the existence of an unsettled question of state law, Pet. App. 59a, and it found no fault with the District Court's conclusion that a state court determination that Section 641(b) has no applicability to banks which do no business in Pennsylvania would obviate the need to address USAA's federal claims. Nevertheless, it rejected abstention under Pullman for two reasons neither of which, in our view, stand close scrutiny.

First, the court found Pullman inappropriate because one of USAA's several federal constitutional claims was a preemption claim under the Supremacy Clause which was "easily separable" from USAA's other constitutional claims (i.e., Commerce, Due Process and Equal Protection Clause claims).

Supremacy Clause claims, according to the Third Circuit, simply are not "substantial federal constitutional questions" within the meaning of Pullman. Second, the Court held that the "potential" damage that USAA's business would suffer, when weighed against Pennsylvania's interest in regulating an insurance company's ownership in lending institutions, mandated that the federal court proceed without awaiting the state court's resolution of the interpretation of Section 641. Pet. App. 59a-68. Because, as we show below, both of these rationales conflict with prior decisions of this Court and, if permitted to stand, will have a significant impact on the principles of comity and federalism which underlie abstention, the Court's review is appropriate.

a. SUPREMACY CLAUSE EXCEPTION

Noting that three "recent cases appear to reflect a growing trend," Pet. App. 64a, the Court of Appeals held that "preemption claims under the Supremacy Clause are not substantial federal constitutional issues for which Pullman abstention might be appropriate." Pet. App. 64a. This reasoning is illogical for several reasons.

USAA's constitutional claims are not limited to the Supremacy Clause; included also are Commerce, Due Process and Equal Protection Clause challenges. Pet. App. 20a, 50a. The practical effect of the Court of Appeals' rationale is that any plaintiff may defeat an otherwise appropriate abstention defense simply by appending a Supremacy Clause claim, a result clearly not envisioned

by the Pullman abstention doctrine.[12]

In Lake Carriers' Assoc. v. MacMullan, 406 U.S. 498 (1972), this Court expressly held, under circumstances similar to those present here, that abstention was appropriate when several constitutional claims, including a Supremacy Clause claim, are at issue. In Lake Carriers, plaintiffs challenged Michigan's Watercraft Pollution Control Act as being violative of the Commerce, Due Process and Equal Protection Clauses.

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[12]Furthermore, the procedural difficulties associated with the Court of Appeals' approach are obvious. What if the District Court on remand, without reaching USAA's other constitutional claims, concludes that the preemption claim is without merit? Should the question be certified for appellate review or should the Court then entertain a second motion to abstain from deciding the remaining constitutional claims?

Alleging that the state regulations also were preempted by several federal laws, the plaintiffs raised a Supremacy Clause claim. 406 U.S. at 502-503.

This Court, noting that the state law never had been construed by any Michigan court, concluded that abstention under Pullman was proper in order to determine "how far Michigan courts will go in interpreting the requirements of the state Watercraft Pollution Control Act in light of the federal Water Quality Improvement Act and the constraints of the United States Constitution." 406 U.S. at 512.[13] The Court of Appeals' holding

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[13]The Court further recognized that, by ordering abstention, the "Michigan courts may also see fit to interpret the Michigan statute in light of the other Supremacy Clause arguments that have been made in this case." Id. at 512 n.15.

here conflicts directly with this Court's decision in Lake Carriers.

In addition, the decision below conflicts with decisions from other Circuits. The First, Fourth and Seventh Circuits have concluded that Pullman abstention is appropriate when Supremacy Clause claims are at issue. See Druker v. Sullivan, 458 F.2d 1272 (1st Cir. 1972) (abstention appropriate to allow Massachusetts courts to interpret state rent control law before federal court determined whether the law applied to housing projects authorized by the National Housing Authority Act, 12 U.S.C. § 1715d); Aluminum Company v. Utilities Commission of State of North Carolina, 713 F.2d 1024 (4th Cir. 1983),

cert. denied, 465 U.S. 1052 (1984) (rejecting the view that abstention is never appropriate when plaintiff asserts a preemption claim); City Investing Co. v. Simcox, 633 F.2d 56 (7th Cir. 1982) (abstention appropriate to allow Indiana court to interpret state takeover act before federal court determined whether the enactment is preempted by the Securities Exchange Act of 1934, 15 U.S.C. § 78a).[14]

Indeed, there is no plausible reason for excluding Supremacy Clause claims from the applicability of Pullman

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[14]Interestingly, the opinion of the Court of Appeals in this case conflicts with an earlier decision of the Third Circuit. In Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980), the Court, citing Simcox, stated that "a classic situation for Pullman abstention" exists if the state law is uncertain and a finding by the state court that the statute is inapplicable would obviate the need to reach a preemption claim. 637 F.2d at 185.

abstention. As pointed out by this Court in Lake Carriers, the very purpose of abstention is to provide the state court an opportunity to reconcile state and federal enactments and thus "avoid or modify the [federal] constitutional question." 406 U.S. at 510. By so doing, the courts avoid "unnecessary friction in federal-state relations," the underlying goal of abstention. See Zwickler v. Koota, 389 U.S. 241, 249 (1967).[15]

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[15]This same overly restrictive analysis led the Court of Appeals to conclude that abstention under Burford also was inappropriate. Although the Court's reversal of Burford abstention may not, in itself, present sufficient justification for this Court's review, it does underscore the significance of the Court of Appeals' failure to implement the interests of comity and federalism which abstention is designed to promote.

Moreover, the Court of Appeals simply was incorrect in concluding that "no constitutional issues of substance are presented" in Supremacy Clause claims. Pet. App. 67a. In Hagans v. Lavine, 415 U.S. 528, 549 (1974), this Court made it clear that a preemption claim is indeed a constitutional claim. And, the adjudication of a preemption claim involves considerations of federalism, not just a simple comparison of the four corners of the state and federal statutes under review. Rather, an intent to displace state law may be evidenced in several ways and the preemption test to be applied in a given case depends upon the "dominance" of the federal government's interest. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

For example, in Hines v. Davidowitz, 312 U.S. 52 (1941), this Court concluded that a federal statute which regulated the registration of aliens preempted any state statutes involving the same subject matter because, even though the state statutes were not necessarily inconsistent with federal law, the "regulation of aliens is so intimately blended and intertwined with responsibilities of the national government" that "the law of the state...must yield to it." 312 U.S. at 66. On the other hand, a Congressional intention to displace local laws in the exercise of the commerce power, especially where health and safety are concerned, generally is not to be inferred "unless clearly indicated" by Congress. See Maurer v. Hamilton, 309 U.S. 598, 614 (1940).

Indeed, except for those instances in which Congress has explicitly and unmistakably stated its intention to preempt an area of regulation in its entirety, a court must determine whether the state provision interferes with the federal scheme embodied in the Constitution. See San Diego Building Trades Council v. Garmon, 359 U.S. 236, 239-243 (1959). Preemption is a two step process - the first involves ascertaining the construction of the two statutes and the second involves determining the "constitutional" question whether they are in conflict. See Chicago and N.W.Tr.Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981).

Thus, because a preemption issue involves not only statutory construction, but also "profound and

delicate constitutional considerations,"[16] the Court of Appeals' holding is incorrect and calls for this Court's review.[17]

b. POTENTIAL HARM EXCEPTION

As a second reason for reversing the District Court's holding that Pullman abstention was appropriate,

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[16]See International Bros. of Electrical Workers v. Public Service Commission, 614 F.2d 206, 210 (9th Cir. 1980), citing Garmon, supra.

[17]Under Pullman abstention, the federal court does not relinquish its opportunity to determine the constitutional questions. Rather, it simply defers action pending the state court's resolution of the unsettled question of state law because that resolution may obviate the need to decide the constitutional questions. See American Trial Layers Assoc., New Jersey Branch v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973). For this additional reason, there is no reason to exempt Supremacy Clause claims from Pullman applicability.

the Court of Appeals concluded that the damage which a state administrative proceeding may have on USAA's business, when weighed against Pennsylvania's interest in regulating insurance, rendered the case inappropriate for abstention. Pet. App. 62a.

These "findings" of potential damage by the Court of Appeals are no more than speculation, unsupported by the record. USAA offered no evidence in the District Court from which a conclusion may be drawn that it will suffer extraordinary harm from engaging in the administrative proceeding.[18] Moreover, as pointed out by Judge Becker in

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[18]Once the prima facie criteria for Pullman abstention are found to be present, only an "emergency situation" of grave and irreparable magnitude will justify federal court intervention. See Reetz v. Bozanich, 397 U.S. 82, 86-87 (1970); Pike v. Bruce Church Inc., 397 U.S. 137, 140 n.3 (1970).

his concurring opinion, Pet. App. 78a, this portion of the Court's holding (1) has "dangerously broad implications", Pet. App. 79a, (2) creates a precedent that could allow virtually any litigant faced with relatively complex state litigation to avoid the application of the Pullman abstention doctrine, and (3) conflicts with prior decisions of this Court which have addressed the harm sufficient to avoid Pullman abstention. See Pet. App. 80a-85a, citing Bellotti v. Baird, 428 U.S. 132, 151 (1976).

In holding as it did, the Court of Appeals ignored the fact that the case involved a garden variety administrative proceeding, and that, by virtue of the supersedeas remedies available to USAA and the Department's willingness to stay "execution in the

event of an administrative decision adverse to USAA until [state] judicial proceedings were completed," Pet. App. 60a, USSA stood in no particular danger of sustaining substantial damage during pendency of state court review. It is abundantly clear that the holding of the Court of Appeals is a significant departure from accepted judicial standards which has the practical effect of seriously weakening the Pullman abstention doctrine. This Court's review is therefore warranted. See Rule 17.1a.

CONCLUSION

The petition for writ of certiorari should be granted. Because the Court of Appeals' reversal under Younger abstention is, on its face, in direct conflict with this Court's recent decision in Dayton, the Court, without further briefing, should vacate the decision of the Court of Appeals and reinstate the district's court's dismissal based on Younger. In the alternative, following plenary review of the matter, the judgment of the Court of Appeals should be reversed.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange and USAA CASUALTY INSURANCE COMPANY, A Texas Stock Insurance Company, and USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance Company,	:	
Plaintiffs,	:	CIVIL NO. 84-1596
vs.	:	
WILLIAM J. MUIR, III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania,	:	
Defendant.	:	

MEMORANDUM

This action is a challenge to Section 641 of Pennsylvania's Insurance Department Act of 1921, 40 Pa. C.S.A. § 281. Plaintiff United Services Automobile Association and its affiliates (hereinafter U.S.A.A.) question the constitutionality of this section under

the Commerce Clause, Supremacy Clause, Due Process Clause of the Fourteenth Amendment, and Equal Protection Clause of the Fourteenth Amendment[.] Section 641 effectively prohibits any insurer who is directly or indirectly tied to a bank, public utility, savings and loan company, or the like, from doing business within the Commonwealth of Pennsylvania.

I. BACKGROUND

U.S.A.A. is a reciprocal inter-insurance exchange organized and existing under the laws of the state of Texas. Its principal place of business is in San Antonio, but it is licensed to sell insurance in Pennsylvania. In April, 1984, U.S.A.A. Financial Services, a wholly-owned subsidiary of U.S.A.A., filed an application with the Federal Home Loan Bank Board for a de novo Federal Savings Bank Charter for the U.S.A.A. Federal Savings Bank. After submission of the appropriate documents, the bank received its charter and began operations in San Antonio on December 30, 1983. This bank does no business in Pennsylvania.

In July, 1984, the Pennsylvania Insurance Department communicated to U.S.A.A. its belief that the operation of the U.S.A.A. Federal Savings Bank

placed U.S.A.A. in violation of § 641 of the Insurance Department Act. In subsequent communications, the Insurance Department advised U.S.A.A. that it must divest itself of the Bank in order to continue operating in Pennsylvania.

In October, 1984, U.S.A.A., by its attorney, responded to the Insurance Department's objections to U.S.A.A.'s indirect acquisition of the Bank and offered an interpretation of § 641 that did not prohibit such an affiliation. When the Insurance Department continued to maintain that U.S.A.A. was in violation of § 641, U.S.A.A. instituted this action against the Acting Insurance Commissioner for a declaratory judgment that § 641 is unconstitutional as applied to U.S.A.A.'s ownership of the Bank and for an injunction against enforcement of § 641 against U.S.A.A.

Defendant responded on December 24, 1984 by moving to dismiss the complaint or stay the proceedings on the ground that the federal courts should abstain from deciding this issue. On the same day, the Insurance Department issued an Order to Show Cause, directing plaintiffs to appear at an administrative hearing for the purpose of determining whether or not plaintiffs have violated § 641(b) of the Insurance Department Act. Plaintiffs opposed the abstention motion and, on January 25, 1985, filed their own motion for summary judgment on preemption grounds. Both of these motions are now before us, but because we find that defendant's abstention motion has merit, we do not reach the preemption issue.

II. ABSTENTION

In certain situations, a federal court may be justified in refusing to exercise its jurisdiction over a cause of action, even though jurisdiction may exist under the constitution and appropriate statutes. Such refusal to exercise jurisdiction is labelled abstention. The abstention doctrine is really a collection of four different doctrines, all concerned with comity, but each deriving from a seminal Supreme Court case and each serving slightly different purposes. The four doctrines are (1) the so-called Pullman doctrine, derived from Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941); (2) the Burford doctrine, derived from Burford v. Sun Oil Co., 319 U.S. 315

(1943); (3) the Younger v. Harris doctrine derived from Younger v. Harris, 401 U.S. 37 (1971); and (4) the Colorado River Water Conservation District doctrine, derived from Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).

In the case presently before us, defendant asserts that there are two types of abstention applicable, and we believe that as many as three support our dismissal of this action. These three are the Pullman, Burford, and Younger doctrines. We will address each doctrine in turn.

A. Pullman Abstention.

Pullman abstention is exercised by federal courts when, along with the constitutional issue in a case, there is an important state law issue which is unclear, and when prompt resolution of

the unsettled state law question will likely avoid the need for a constitutionally-based decision. The Supreme Court first developed and applied this doctrine in Railroad Commission of Texas v. Pullman, supra. In that case, the Texas Railroad Commission had ordered that Pullman sleeping cars must be attended at all times by a conductor, rather than a porter as was the custom of less travelled routes. The Commission's order had a racially discriminatory effect, because all conductors were white, while all porters were black.

In exercising Pullman - type abstention for the first time, the Supreme Court noted that the purpose of such restraint was to demonstrate "'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal

judiciary." Pullman, 312 U.S. at 501. In Pullman, abstention was warranted because, along with the "substantial constitutional issue" (race discrimination) touching on "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative . . . is open," id. at 498, there was a question of the statutory authority of the Railroad Commission to promulgate the discriminatory regulation. Because the law of Texas furnished "easy and ample means for determining the Commission's authority," id. at 501, and because the constitutional adjudication could plainly be avoided "if a definitive ruling on the state issue would terminate the controversy," id. at 498, the Supreme Court ruled that it was appropriate for the district court to stay the federal

proceeding pending resolution of the state issue in the state court.

In cases subsequent to Pullman, the Supreme Court and the lower federal courts fleshed out this doctrine, making it clear that this doctrine of abstention

> is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

County of Allegheny v. Frank Mashuda Company, 360 U.S. 185, 188-189 (1959). Despite the narrowness of the doctrine, abstention is quite proper "when difficult and unsettled questions of state law

must be resolved before a substantial federal constitutional question can be decided." Hawaii Housing Authority v. Midkiff, 81 L.Ed.2d 186, 194 (1984).

The overriding prerequisite to exercise of Pullman abstention appears, from the case law, to be that the state law question be "unsettled" and potentially dispositive. The Supreme Court has stated,

> The relevant inquiry is not whether there is a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary. Rather, "[w]e have frequently emphasized that abstention is not to be ordered unless the statute is of an uncertain nature, and is obviously susceptible of a limiting construction."

Hawaii Housing Authority, supra, at 195, quoting Zwickler v. Koota, 389 U.S. 241, 251 (1967).

The instant case is one in which there is clearly an unsettled and potentially dispositive issue of state law. The dispute between U.S.A.A. and the Insurance Department has, from the beginning, focused on the interpretation of § 641 of the Insurance Department Act. The Insurance Department relies on subsection (b) to support its mandate that U.S.A.A.'s affiliation with the U.S.A.A. Federal Savings Bank must be severed if U.S.A.A. is to retain its license to sell insurance in Pennsylvania. U.S.A.A. on the other hand, relies on subsections (c) and (a)(1) in arguing that the Insurance Department's interpretation of the Act is erroneous and that it need not divest itself of the Bank.

The language relied on by the Insurance Department, in pertinent part, reads "[N]o lending institution, public utility, bank holding company, savings and loan holding company, or any subsidiary or affiliate of the foregoing, . . . may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State . . . ." 40 Pa. C.S.A. § 281(b). In its enforcement communications with U.S.A.A., the Insurance Department apparently assumed that U.S.A.A. is a bank holding company. Bank holding companies, no matter where their banks are located, are barred from holding an insurance license in Pennsylvania, according to the Insurance Department's interpretation of this section.

Although this interpretation of § 641(b) appears to flow naturally from the clear language of subsection (b), an ambiguity arises when § 641 is read as a whole. Subsection(c) states the purposes of § 641:

> to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions and public utilities against insurance companies, agents and brokers.

40 Pa. C.S.A. § 281(c). "Lending institution" as used in subsection (c), and, indeed, in the whole of § 641, is defined as "any institution that accepts deposits and lends money in the Commonwealth of Pennsylvania...." 40 Pa. C.S.A. § 281(a)(1). Given this definition of lending institution as limited to institutions accepting deposits and lending money in Pennsylvania, the clearly stated purpose of § 641 then, is

to maintain separation between Pennsylvania lending institutions and the insurance business.

The Insurance Department's purportedly clear meaning interpretation of § 641(b) simply does not mesh with the clearly stated purpose of the section as expressed in § 641(c). In fact, as applied to U.S.A.A. and the U.S.A.A. Federal Savings Bank, a Texas lending institution, there is a blatant conflict between the stated purpose of § 641 and the result reached by literal application of subsection (b) to the instant situation. This conflict between subsections (b) and (c) is just the type of ambiguity that triggers the application of Pullman abstention. As confirmed by the Third Circuit in a recent ruling, abstention is appropriate even in a case where, as here, the ambiguity appears only when two otherwise clear statutory

provisions are read side by side: "The need for state court interpretation results not only from unclear language on the face of a single statute, but also from the juxtaposition of clear, but contradictory state provisions." Georgevich v. Strauss, No. 84-5194, slip. op. (3d Cir., September 5, 1985).

Once it is established that an ambiguity exists sufficient to call for application of the Pullman abstention doctrine, the district court must next determine whether resolution of the state law will avoid the need for a constitutionally-based decision. In this case, decision of the state law question is a logical prerequisite to consideration of U.S.A.A.'s constitutional challenges. If a court were to determine that the clearly articulated

purpose of § 641(c) controls the interpretation of § 641(b), then U.S.A.A. would not be in violation of the statute and there would be no need to reach the constitutional issues.

Because we have determined that a potentially dispositive issue of state law exists, we must turn to the final consideration involved in Pullman abstention questions: are there the requisite "exceptional circumstances" and would abstention "clearly serve an important . . . interest"? See County of Allegheny v. Frank Mashuda Company, supra, at 189. In other words, are there considerations of comity that would mandate state court, rather than federal court, decision of the state law issue? The answer in this case is yes. Under the McCarran-Ferguson Act, 15 U.S.C. § 1011-1105, power to regulate

the insurance industry was given exclusively to the states. The ambiguous state statute in question is part of a comprehensive regulatory scheme implementing the power granted under the McCarran-Ferguson Act. Interpretation of such a statute and resolution of ambiguities therein should be left, therefore, in the first instance, to the state administrative machinery and eventually through appeals, to the state court system. Accord, Mathias v. Lennon, 474 F.Supp. 949 (S.D. N.Y. 1979)("Not only would the New York court's decision have special authority on questions of New York law, but it undoubtedly possesses greater experience in dealing with the highly technical insurance statutes involved here." Id. at 95556 [sic-956]).

U.S.A.A. argues that we should not abstain in this case because of the delays inherent in abstention and because of the resulting prejudice to U.S.A.A. and its policyholders. U.S.A.A. claims that, if the state administrative and court system is permitted to decide the state law issue, U.S.A.A. will be deprived of its license to sell insurance in this state pending final adjudication of the constitutional claims. We do not agree with the conclusion that U.S.A.A. will be deprived of its license to its prejudice. Even assuming that the state courts fail to decide the state law issue in U.S.A.A.'s favor, U.S.A.A. will suffer no prejudice because of the availability of appeal and supersedeas procedures. These procedures will assure U.S.A.A. that, before its license is revoked and it is

prohibited from doing business in Pennsylvania, it will have the opportunity to be heard on both the state law issue and the constitutional challenges.

U.S.A.A. also objects to abstention on the ground that abstention is inappropriate where the constitutional issue is a preemption claim based on the Supremacy Clause. We cannot accept this contention in this case because preemption is not the only constitutional claim raised in the complaint, as U.S.A.A. should know.

B. Burford Abstention.

The second type of abstention applicable to this case is that exercised in Burford v. Sun Oil Company, 319 U.S. 315 (1943). In that case, the Texas Railroad Commission granted Burford a permit to drill four wells.

Sun Oil brought an action in district court attacking the validity of the order granting the permit. In ruling that the federal courts should not involve themselves in essentially regulatory matters, the Supreme Court noted the confusion caused by such intervention:

> The very "confusion" which the Texas legislature and Supreme Court feared might result from review by many state courts of the Railroad Commission's orders has resulted from the exercise of federal equity jurisdiction... . Delay, misunderstanding of local law and needless federal conflict with the State policy, are the inevitable product of this double system of review.

Burford, supra, at 327. In light of the problems inherent in the exercise of federal court jurisdiction over state regulatory matters when there is an

extensive and complicated regulatory scheme, the Supreme Court held that abstention was the most appropriate course of action:

> The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here... . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.

Id. at 333-34.

From the language of the Supreme Court in Burford, and in other cases raising similar issues, it appears that the central requirement for the exercise of Burford abstention is the existence of "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Colorado River Water Conservation District v. United States, 424 U.S. 800, 814 (1976); Accord, County of Allegheny v. Frank Mashuda Company, 360 U.S. 185, 189 (1959)("This Court has also upheld an abstention on grounds of comity with the States when the exercise of jurisdiction by the federal court would disrupt a state administrative process, ... or otherwise create needless friction by unnecessarily enjoining state officials from executing domestic policies...").

These types of state law questions bearing on important state issues have been recognized in a variety of contexts, including insurance regulation cases. In Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980), the Second Circuit ruled that a dispute between retired employees of Consolidated Mutual Insurance Company and the liquidator of that company should have been left to the state administrative and court systems for determination. In applying Burford abstention, the court noted that "the federal courts have abstained in numerous areas where state regulation involved matters of substantial state concern and where state policies were carried out in a statutorily established regulatory program by state officials." The court found that the area of insurance regulation was an area in which

state court and administrative systems deserved great deference by federal courts:

> It is ... highly significant that the state scheme has been adopted pursuant to congressional authorization. In the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1105, Congress mandated that regulation of the insurance industry be left to the individual states. Thus, the administrative and judicial scheme erected by New York to regulate insurance companies, including that part enabling institution and implementation of liquidation proceedings, operates pursuant to an express federal policy of noninterference in insurance matters. Federal courts have therefore been slow to interpret such schemes unless necessary, particularly when federal court action would impinge upon the area in which Congress has recognized the overriding interest of the states.

Levy, supra, at 963-964.

We find that Burford abstention is appropriate in this case not only because we agree with the Second circuit in Levy that federal courts should be slow to disrupt state insurance regulatory schemes authorized by the McCarran-Ferguson Act, but also because of the extensive and complicated nature of the state regulatory scheme involved. The policies implemented by § 641 of the Pennsylvania Insurance Department Act are essentially state policies developed to protect state citizens and implement state concerns. As in Burford itself, the state in this case provides a "unified method for the formation of policy and determination of cases by the commission and by the state courts." Burford, supra, at 333.

If the state procedure is followed from the Insurance Department up through the Commonwealth Court and the State Supreme Court, the state itself will have an opportunity to interpret and mold its own policies in this area of significant state concern, while at the same time, the federal questions will be preserved for ultimate review by the United States Supreme Court, if necessary. No disruption of the State administrative procedures will be necessary, and the potential for conflicting and confusing federal court and state court rulings will disappear.

We do not agree with U.S.A.A.'s argument that abstention is inappropriate because the factual situation presented here does not involve the "business of insurance" and therefore is not governed by the McCarran-Ferguson

Act. Even if § 641 does not directly regulate an "integral part of the policy relationship between the insurer and the insured," Union Labor Life Insurance Co. v. Pireno, 458 U.S. 119, 129 (1982), the policies behind § 641 and designed to be implemented by § 641 may have everything to do with the relationship between insurers and insured. Formulation and implementation of such policies are strictly the province of the state's legislative and administrative bodies. To avoid federal interference in such an important area of state functioning, we must abstain from exercising our jurisdiction in this case.

We also do not agree that Burford abstention is inappropriate because the administrative proceeding in this case was instituted the same day as the motion to dismiss was filed. It is not a requirement of Burford abstention

that there be a specific preexisting state proceeding to which the federal court may defer.[1] Rather, all that is required is that there be a pervasive regulatory scheme and a procedure within that scheme through which plaintiff's complaints may be addressed. See Meicler v. Aetna Casualty and Surety Company, 372 F.Supp. 509 (S.D. Texas 1974), aff'd, 506 F.2d 732 (5th Cir. 1975).

C. Younger Abstention.

The final abstention doctrine applicable to this case is the one derived from the Younger v. Harris case and its progeny. Although none of the parties in the instant case argued the

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[1]Such a proceeding is required when exercising Younger abstention, however. This requirement will be discussed further in section C, infra.

merits of this doctrine in connection with the motion before us now, our review of the case law on abstention indicates that this third type of abstention is also applicable.

Younger abstention, originally a doctrine applicable only to actions brought in a federal court to enjoin state criminal proceedings, has broadened in recent years to include even federal actions to enjoin ongoing state administrative proceedings. See, Williams v. The Red Bank Board of Education, 662 F.2d 1008 (3d Cir. 1981). As noted by the Third Circuit in that case, the keystone of the Younger abstention doctrine is

> the notion of "comity," that is, a proper respect to state functions, a recognition of the fact that the entire country is made up of a Union of separate state

> governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Id. at 1014, quoting Younger v. Harris, 401 U.S. 37, 44 (1971).

According to the Third Circuit's reading of the Younger doctrine in the Williams case, Younger abstention is appropriate "where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interest." Id. at 1077. A prerequisite to such abstention, of course, is that there be an existing state proceeding

to which the federal court may defer. Hawaii Housing Authority v. Midkiff, 81 L.Ed.2d 186, 195 (1984).

In the instant case the state administrative proceeding was instituted after U.S.A.A. filed its complaint in this court. The bare fact that the state proceeding came after the initial filing in federal court does not render Younger abstention inapplicable, however. The Supreme Court stated in the Hawaii Housing Authority case that Younger abstention is appropriate "when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place in the federal court.'" Id. at 195, quoting Hicks v. Miranda, 422 U.S. 332, 349 (1975). The state Order to Show Cause was issued by the Insurance Department in the instant case on the same day that

defendant filed his motion to dismiss in federal court. This motion to dismiss was the first motion filed in the case. We do not believe that the mere filing of a motion means that proceedings of substance on the merits have taken place in federal court. Further, although the Order to Show Cause was not issued until December 24, 1984, the administrative enforcement machinery began rolling in July and August, 1984 when the Insurance Department formally communicated to U.S.A.A. its belief that U.S.A.A. was in violation of § 641.

Given that we find that there is a preexisting state administrative proceeding, we must next engage in the two-step analysis of the propriety of abstention recommended by the Third Circuit in Williams. The first step is to determine if the state's interest in going forward with the administrative

proceeding without intrusion by the federal courts is sufficiently weighty to mandate Younger abstention. Williams, 662 F.2d at 1017. As noted in the prior analyses of the other types of abstention, the state's interest in regulating the insurance industry is a substantial one. Pennsylvania has established an extensive and comprehensive scheme for regulating the licensure and operations of insurance companies in this Commonwealth. Regulation of the insurance industry is committed solely to the states by the McCarran-Ferguson Act. Any intervention into this regulatory process by a federal court should not be taken lightly. Because insurance regulation is solely the concern of the states, and because Pennsylvania has implemented an extensive scheme for that regulation, we find that Pennsylvania's

interest in going forward with the administrative proceeding is sufficiently weighty to justify abstention under the Younger doctrine.[2]

The second prerequisite to the application of Younger abstention is that there be a state administrative forum adequate to vindicate the federal or constitutional claims raised by plaintiff. As we have already noted,

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[2]Mathias v. Lennon, 474 F.Supp. 949 (S.D. N.Y. 1979), another district court case, also held that Younger abstention was appropriate in the context of an insurance dispute where there was a preexisting administrative proceeding. In that case the court said "[t]he fact that this case seeks to enjoin a ruling in a pending state proceeding, brought by a state official, implicating an important state concern and in which Mathias is fully able to raise the constitutional claims made here strongly supports the conclusion that the complaint should be dismissed." Id. at 956.

Pennsylvania provides such a forum through its system of appeals to the Commonwealth Court and the state Supreme Court.

Because we find that the instant case meets all the prerequisites for Younger abstention, and because it involves regulation of the insurance business which is committed to the states, we hold that Younger abstention is appropriate in this case.

The appropriate procedure when a district court abstains from deciding a case or an issue more appropriately handled by the state courts is either a stay of the federal court proceedings or dismissal of the case from federal court altogether, depending upon the type of abstention exercised and a "consideration of what is appropriate to the cir-

cumstances of that case." Williams v. The Red Bank Board of Education, supra, at 1023, n. 15. Because we find today that the state administrative and court systems provide an opportunity for U.S.A.A. to raise all of its claims, and because successful pursuit of those claims in the state system will afford U.S.A.A. all of the relief it requests from this court, we will dismiss the action on abstention grounds.

/s/ R. DIXON HERMAN
UNITED STATES DISTRICT JUDGE

DATED: Sept. 30, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange and USAA CASUALTY INSURANCE COMPANY, A Texas Stock Insurance Company, and USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, and USAA ANNUITY AND LIFE INSURANCE COMPANY, a Texas Stock Insurance Company,	:	
Plaintiffs,	:	CIVIL NO. 84-1596
vs.	:	
WILLIAM J. MUIR, III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania,	:	
Defendant.	:	

O R D E R

AND NOW, this 30th day of September, 1985, IT IS ORDERED that Defendant's motion to dismiss be and hereby is granted.

The Clerk of Court is directed to close the file.

/s/ R. DIXON HERMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-5662

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance
Exchange

and

USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company

and

USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company

and

USAA ANNUITY AND LIFE INSURANCE COMPANY
a Texas Stock Insurance Company

v.

WILLIAM J. MUIR, III,
Acting Insurance Commissioner of the
Commonwealth of Pennsylvania

United Services Automobile
Association, USAA Casualty Insurance
Company, USAA Life Insurance
Company, and USAA Annuity and Life
Insurance Company,
Appellants

Appeal from the United States District
Court for the
Middle District of Pennsylvania
(Scranton)
Civil No. 84-1596

Argued March 6, 1986
Before GIBBONS, BECKER, and ROSENN,
Circuit Judges
Opinion Filed June 6, 1986

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OPINION OF THE COURT

ROSENN, Circuit Judge

This appeal requires us to examine various forms of abstention advanced by the district court in choosing to refrain from exercising jurisdiction. Included is an unsettled question under the abstention doctrine promulgated in Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941): whether a claim that federal statutes preempt state law under the supremacy clause raises a substantial constitutional question which permits abstention.

United Services Automobile Association (USAA) and some of its subsidiary insurance companies filed suit against William J. Muir, III, as Acting

Insurance Commissioner of the Commonwealth of Pennsylvania, seeking to enjoin the state insurance department from revoking USAA's license to insure persons in Pennsylvania. The insurance department asserts that USAA following its purchase of a Texas bank is in violation of a Pennsylvania statute prohibiting mergers between financial institutions and insurers. USAA argues that such a construction of the state statute is preempted by federal banking statutes that permitted it to purchase the bank and otherwise violates the constitution. The United States District Court for the Middle District of Pennsylvania concluded that abstention

applied, and dismissed the suit.[1] We disagree and reverse.

I.

The relevant facts as stated in USSA's complaint are not disputed in this appeal. USAA is a reciprocal interinsurance exchange[2] organized

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[1]The district court had jurisdiction under 28 U.S.C. § 1331 (1982) (federal questions), 28 U.S.C. § 1332 (1982)(diversity), and 28 U.S.C. § 1337 (1982) (statutes affecting commerce). For diversity purposes, USAA and its subsidiaries are residents of Texas, and Muir is a resident of Pennsylvania. Dismissal following an abstention order is a final judgment reviewable by this court under 28 U.S.C. § 1291 (1982). Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative, 583 F.2d 104, 109 (3d Cir. 1978).

[2]In a reciprocal interinsurance exchange,

> individuals, partnerships, or corporations engaged in a similar line of business undertake to indemnify each

(FOOTNOTE CONTINUED ON NEXT PAGE)

under the laws of Texas. USAA and three of its wholly owned insurance company subsidiaries, with which it filed this suit, have their principal place of business in San Antonio, Texas. They limit their insurance services primarily to commissioned officers of the United States armed forces and do business nationwide. They provided insurance services in 1983 to more than 40,000 Pennsylvania policy holders who paid more than $35,000,000 in annual policy premiums.

(FOOTNOTE CONTINUED)

other against a certain kind or kinds of losses by means of mutual exchange of insurance contracts. . . . whereby each member separately becomes both an insured and an insurer with several liability only.

2 Couch on Insurance, § 18:11 at 614-15 (2d ed. 1984).

That year, USAA Financial Services Company (then known as USAA Development Company), a wholly owned subsidiary of USAA, applied for and received from the Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation (FSLIC) permission to organize and operate the USAA Federal Savings Bank (the Bank) in San Antonio, Texas. USAA Financial Services also received permission from the FSLIC to serve as a unitary savings and loan holding company. The insurance department does not allege that USAA failed to comply with any requirements of federal law in organizing the Bank. USAA has made an initial investment of more than $20,000,000 through its subsidiary to capitalize the Bank. The subsidiary holding company and the Bank are not

parties to this suit. The Bank does not solicit deposits from Pennsylvania residents or do business in Pennsylvania.

In mid-1984, the Pennsylvania insurance department notified USAA that its ownership of a bank violated section 641 of the Pennsylvania Insurance Act of 1921, and that "USAA must, to continue its business in Pennsylvania, divest itself of the Bank, or, failing such divestiture, risk revocation of its license to transact insurance business in Pennsylvania." The Pennsylvania Insurance Act of 1921, section 641, as amended in 1974, provides in relevant part:

(b) No lending institution, . . . bank holding company, savings and loan holding company [as defined in federal statutes] or any subsidiary or affiliate of the foregoing, or officer or employee thereof, may directly or indirectly, be licensed or admitted as an insurer . . . in this State . . . .

(c) The Insurance Commissioner is authorized to promulgate regulations in order to effectuate the purposes of the section, which are to help maintain the separation between lending institutions and public utilities and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions . . . against insurance companies, agents and brokers.

Codified at 40 Pa. Stat Ann. § 281 (Purdon 1985 Supp.).

The insurance department argued that because USAA Financial Services is a federally regulated savings and loan holding company, as defined by federal statutes, and solely owns USAA Financial Services, the latter is its affiliate and USAA is therefore in violation of section 641(b). In reply, USAA asserted that section 641 is ambiguous and can be read not to apply to it. Section 641(c) states that the purpose of section 641 is to help maintain the separation between lending institutions and the insurance business and minimize the possibilities of unfair competitive practices by lending institutions. Under section 641(a)(1),[3] a lending

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[3]Section 641(a)(1) provides:
(a) As used in this section [641]:

(FOOTNOTE CONTINUED ON NEXT PAGE)

institution means any institution that does banking business in Pennsylvania. By reading parts (a)(1) and (c) of section 641 together, USAA argued that the purpose of the section is limited to preventing financial institutions doing business in Pennsylvania from competing or being affiliated with Pennsylvania insurers; as the Bank is based and does business only in Texas, the section does not apply to USAA.

(FOOTNOTE CONTINUED)

> (1) "Lending institution" means any institution that accepts deposits and lends money in the Commonwealth of Pennsylvania, including banks and savings and loan associations, but excluding insurance companies.

Codified at 40 Pa. Stat. Ann. § 281(a)(1)(emphasis added).

USAA and its plaintiff subsidiaries filed suit in the district court under 42 U.S.C. § 1983, alleging that the insurance department's proposed reading of section 641 violated the supremacy, equal protection, and due process clauses of the constitution, and seeking declaratory and injunctive relief. One month after USAA filed suit, the insurance department commenced state administrative proceedings for the revocation of USAA's insurance licenses in Pennsylvania and filed in the district court a motion to dismiss the suit on abstention grounds. While the district court considered this motion, USAA filed a motion for summary judgment on preemption grounds. Citing Pullman, supra, Burford v. Sun Oil Co., 319 U.S. 315 (1943), and Younger v. Harris, 401

U.S. 37 (1971), the district court concluded that it should abstain from addressing USAA's suit, and dismissed the suit without considering USAA's summary judgment motion. USAA appealed.

On November 22, 1985, this court granted a motion for an injunction preventing the insurance department from revoking USAA's licenses pending resolution of this appeal. The Pennsylvania Insurance Commissioner has heard testimony in the administrative proceedings to revoke USAA's licenses, but, as of oral argument, he had not announced any decision.

II.

Abstention from the exercise of federal jurisdiction is, in all its forms, "the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800,

813 (1976). It is an extraordinary and narrow exception to the district court's duty to adjudicate a controversy properly before it, justified only in the exceptional circumstances where resort to state proceedings clearly serves an important countervailing interest. Id.

In reviewing abstention decisions, appellate courts apply the various criteria for abstention articulated by the Supreme Court in much the same way they would apply provisions of a statute. 1A J. Moore, Federal Practice § 0.203[1] at 2106 (1985). A district court has little or no discretion to abstain in a case that does not meet traditional abstention requirements. C-Y Development Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1985). Within these constraints, determination whether the exceptional circumstances required for abstention exist is left

to the district court, and will be set aside on review only if the district court has abused its discretion. Harman v. Forssenius, 380 U.S. 528, 534 (1965); United States v. City of Pittsburgh, 757 F.2d 43, 45 (3d Cir. 1985). Determinations that are essentially legal, such as deciding whether interpretation of a state law is unsettled, are reviewed do novo on appeal. D'Iorio v. County of Delaware, 592 F.2d 681, 686 (3d Cir. 1978). overruled on other grounds, Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982) (in banc). We therefore turn to an analysis of the abstention grounds on which the district court relied.

III.

Pullman abstention, as most recently defined by the Supreme Court, instructs "that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984). USAA advances three principal grounds for not applying Pullman abstention in this case: there is no unsettled question of state law; abstention would cause USAA substantial and irreparable economic harm; and its preemption claim does not constitute a substantial federal constitutional question.

A.

For Pullman to apply, the state statute must be "obviously susceptible of a limiting construction" and "a bare, though unlikely, possibility that state courts might render adjudication of the federal question unnecessary" is insufficient. Hawaii Housing, 467 U.S. at 237 (emphasis in original). A statute is unsettled for Pullman purposes when two of its provisions are contradictory. Georgevich v. Strauss, 772 F.2d 1078, 1090-91 (3d Cir. 1985) (in banc), cert. denied, 106 S.Ct. 1229 (1986). In seeking Pullman abstention, the insurance department has argued that the provisions of section 641 are ambiguous and contradictory, and that with no state court decisions interpreting the section, its meaning is unsettled. In reply, USAA contends that the insurance

department's interpretation of the laws it is charged with enforcing and its actions implementing that interpretation renders the statute unambiguous.

The Supreme Court has held that Pullman abstention is not appropriate if an otherwise ambiguous statute has been authoritatively construed by the state courts, see e.g. Kusper v. Pontikes, 414 U.S. 51, 55-56 (1973), but it has not held that an administrative interpretation will suffice as an authoritative reading of state law. Although one court has suggested that an administrative interpretation of a statute that creates a constitutional problem eliminates the statute's ambiguity, the challenged statute in that case was clear on its face and not susceptible of any other construction. National City Lines, Inc. v. LLC Corp., 687 F.2d 1122,

1126 (8th Cir. 1982). Indeed, an administrative interpretation that would moot the constitutional issue raised by another reading of an ambiguous statute fortifies the claim for abstention. See, e.g., Bellotti v. Baird, 428 U.S. 132, 148 (1976); Georgevich, 772 F.2d at 1090-91.

Generally, an administrative interpretation of a facially ambiguous state statute will not remove the ambiguity, for Pullman purposes. See Anderson v. Babb, 632 F.2d 300, 306 (4th Cir. 1980). In keeping with statutorily imposed maxims for construing legislative intent, Pennsylvania courts ordinarily defer to administrative interpretations of statutes. See 1 Pa. Cons. Stat. Ann. § 1921(c)(8) (Purdon 1985 Supp.). The interpretation given a statute by the agency charged with its execution and application "is entitled

to great weight and should be disregarded or overturned only for cogent reasons or if such construction is clearly erroneous." Cohen v. Pennsylvania Public Utility Commission, 494 A.2d 58, 61 (Pa. Comm. Ct. 1985); see Wiley House v. Scanlon, 465 A.2d 995, 999 (Pa. 1983) (administrative interpretation of a regulation followed unless it is plainly erroneous or inconsistent with the authorizing statute). Although the insurance department's interpretation of section 641 is not clearly erroneous, USAA's cogent alternative interpretation that the statute does not apply to lending institutions that do not do business in Pennsylvania might well be adopted by the state courts. Thus, despite the deference Pennsylvania courts pay administrative interpretations, we cannot say that they would accept the insurance department's

interpretation of section 641 as a definitive statement of Pennsylvania law. The state law is therefore unsettled for Pullman purposes.

B.

USAA also argues that the potential damage that its business would suffer during state administrative and court proceedings outweighs any important countervailing interests of Pennsylvania in abstention. The Supreme Court has held that a district court was fully justified in not abstaining when the constitutionality of a narrow and specific-- though ambiguous -- state statute was at issue, and any delay in settling the issue would result in substantial economic losses. Pike v. Bruce Church Inc., 397 U.S. 137, 140 & n.3 (1970)(allegedly unconstitutional state regulation threatened loss of $700,000

fruit crop. This court observed that undue delay and the increased cost of state litigation made abstention unnecessary when the federal court in resolving the constitutional issue "would not upset sensitive state programs" and the issue was neither novel nor difficult. McKnight v. Southeastern Pennsylvania Transportation Authority, 583 F.2d 1229, 1241 (3d Cir. 1978) (narrow due process rights of certain state employees facing dismissal). The Court, however, did not find that the district court abused its discretion by abstaining. Id. at 1242.

The insurance department has indicated a willingness to expedite consideration of USAA's claims in state procedures, and to agree to a stay of execution in the event of an administrative decision adverse to USAA until judicial proceedings were completed. USAA

explains plausibly, however, how a state administrative order to revoke its insurance license, even if stayed, would in itself hurt its reputation generally and impair its marketing of insurance, even in other states, regardless of the time factor in litigating. It is uncontested that USAA has an excellent nationwide reputation as an insurer and is financially sound. The threat of a license revocation, a harsh sanction, may suggest in the marketplace fraudulent or illegal activity or financial instability. It could be difficult or perhaps impossible for USAA to explain to consumers and to the insurance industry that the license revocation proceedings in Pennsylvania do not represent such a sanction. The threat of revocation might alarm an unknown number of USAA's more than 40,000 Pennsylvania policyholders into cancelling

their insurance. Nationwide, a revocation order even if stayed, would prevent USAA from continuing unqualifiedly to represent that its insurance contracts are available in all 50 states. Because USAA limits its policies primarily to commissioned officers of the United States armed forces, persons who move frequently in the service of their country, the inability to offer insurance coverage in every state may well be a major blow.

Weighing the legal issues and the devastating economic consequences a license revocation would impose upon USAA on the one hand and the vague claim of risks to the state from a Texas bank not doing business in Pennsylvania on the other hand, we conclude that the district court erred by holding that state appeal and supersedeas procedures adequately protected USAA's interests.

See Professional Plan Examiners of New Jersey v. Lefante, 750 F.2d 282, 290-91 (3d Cir. 1984).

C.

Alternatively, USAA asserts that its claim that federal statutes preempt contrary state insurance laws does not pose the substantial federal constitutional claim required for Pullman abstention. Hawaii Housing, 467 U.S. at 236. The Ninth Circuit supports this claim for it has held that Pullman abstention is inappropriate for preemption questions grounded in the Supremacy Clause. Knudsen Corp. v. Nevada State Dairy Commission, 676 F.2d 374, 377 (9th Cir. 1982). "Although preemption has its doctrinal base in the Constitution, the question is largely one of determining the compatibility of a state and

a federal statutory scheme. No constitutional issues of substance are presented." Id. The Tenth Circuit recently reached the same conclusion, stating in strong dictum that "[t]he Supreme Court does not appear to view federal preemption questions based only on the Supremacy Clause as the type of constitutional issues that the Pullman doctrine counsels courts to avoid." Federal Home Loan Bank Board v. Empie, 778 F.2d 1447, 1451 n.4 (10th Cir. 1985); see International Longshoremen's Association, AFL-CIO v. Waterfront Commission of New York Harbor, 495 F.Supp. 1101, 1113-14 & nn.51-18 (S.D.N.Y. 1980), modified in other part, 642 F.2d 666 (2d Cir.), cert. denied, 454 U.S. 966 (1981). These recent cases appear to reflect a growing trend.

This court recently has also suggested in dicta that preemption questions are not appropriate for Pullman abstention. In reversing a district court abstention decision, we stated that "[i]t would be inconsistent with our paramount duty to interpret and protect federal law to invoke Pullman abstention in this preemption case." Kennecott Corp. v. Smith, 637 F.2d 181, 185 (3d Cir. 1980). Supremacy clause claims essentially involve federal policy and "the federal courts are particularly appropriate bodies for the application of preemption principles." Id. (quoting Hagans v. Lavine, 415 U.S. 528, 550 (1974)). Because the questioned state statute in Kennecott unambiguously conflicted with the federal statute, there was no unsettled state law question requiring Pullman abstention. 637 F.2d at 185.

The Supreme Court has held that "the basic question involved in [preemption claims under the Supremacy Clause] is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes," Swift & Co. v. Wickham, 382 U.S. 111, 120 (1965), and where a case involves a nonconstitutional federal issue, the necessity for deciding which depends on the decision of an underlying state law, the federal courts, when necessary, decide both issues. Propper v. Clark, 337 U.S. 472, 490 (1949). The holdings of Swift and Propper, read together, suggest that a federal court should not abstain under Pullman from interpreting a state law that might be preempted by a federal law, because preemption problems are resolved through a non-constitutional

process of statutory construction. See 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4242 at 454-55 (1978) (Pullman abstention inappropriate in a Supremacy Clause case); cf. 1A J. Moore, Federal Practice § 0.203[2] at 2141 (1985) (where clear conflict between federal and state statutes, no abstention appropriate).

Because USAA had pled other constitutional violations in its complaint, the district court declined to consider whether its preemption argument, taken alone justified preemption. USAA's preemption claim was the sole basis for its motion for summary judgment, however, and is easily separable from its other claims should USAA choose to purse them. Accordingly, we hold that preemption claims under the Supremacy Clause are not substantial federal constitutional issues for which Pullman

abstention might be appropriate.[4] Thus, the district court erred in deciding that the preemption claim also afforded a basis for abstention on Pullman grounds.

IV.

Under Burford, abstention is appropriate "where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Colorado River 424 U.S. at 814.

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[4]We note that a panel of this court has very recently held on other grounds that preemption questions are often not suitable for abstention under the doctrines announced in Burford and Younger. Kentucky West Virginia Gas co. v. Pennsylvania Public Utility Co., No. 85-5779 (3d Cir. June 2, 1986), slip op. at 10-11, 13-14.

If the exercise of federal review would be disruptive of state efforts to establish a coherent policy, and the policy concerns complicated local matters, abstention may be justified. Id. Generally, Burford abstention is justified where a complex regulatory scheme is administered by a specialized state tribunal having exclusive jurisdiction. See, Allegheny Airlines, Inc. v. Pennsylvania Public Utility Commission, 465 F.2d 237, 241-45 (3d Cir. 1972), cert. denied, 410 U.S. 943 (1973); see generally, 1A J. Moore, supra §0.203[2] at 2140-41 (collecting cases).

The district court in the present case found that Burford abstention was appropriate because the McCarran-Ferguson Act gave the states

exclusive control over the regulation of insurance, 15 U.S.C. § 1012 (1982), and because section 641 is part of a complex regulatory scheme governing insurance. It cited Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980), which held that abstention was proper to allow a state regulatory body to settle claims against a liquidating insurer. The Levy court found it "highly significant that the state scheme has been adopted pursuant to congressional authorization" under McCarran-Ferguson, 635 F.2d at 963.

The Supreme Court has established a three-part test for determining whether state regulation is part of the business of insurance, 15 U.S.C. § 1012 (a) & (b), reserved to the states by McCarran-Ferguson:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982). "None of these criteria is necessarily determinative in itself." Id. The state regulations implicated in Levy concerned both the future coverage of policyholders and their relationship with a defunct insurer, and so were authorized under McCarran-Ferguson. The purpose of section 641, as stated in its part (c), is to prevent competition between insurers and Pennsylvania financial institutions. Unlike the regulations in Levy, the section is not concerned with

transferring or spreading the policyholder's risk; affiliation between insurers and banks has no integral connection to the relationship between the insured and insurer; and banks are not entities within the insurance industry. Regulations such as section 641 have no part in the business of insurance under McCarran-Ferguson.

The district court also thought Burford abstention was appropriate because section 641 is part of an "extensive and complicated . . . state regulatory scheme." The interpretation of section 641 in this case does not require consideration of any other Pennsylvania statute and the relevant facts are simple and undisputed; no complicated regulatory scheme is involved. The insurance department has not suggested any peculiar local conditions or special expertise required to interpret

the statute. The state proceeding merely involves reading and construing a statute, a task for which courts are best equipped, and not administrative factual determinations, such as are involved in the setting of a proper utility rate. The district court erred in applying Burford to this case.

V.

Under Younger, "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." Hawaii Housing, 467 U.S. at 237-38 (emphasis added). Younger abstention is required only when the state court proceedings are initiated prior to any proceedings

on the substance of the merits in federal court. Id. at 238. USAA argues that Younger abstention was inappropriate here because state proceedings did not commence until sometime after the federal suit was filed, and because these proceedings were administrative and could not address constitutional arguments.

The commencement of administrative proceedings after the federal suit was filed, even with the intention of removing federal jurisdiction by abstention, does not preclude the application of Younger. So long as "the federal litigation was in an embryonic stage and no contested matter had been decided," the district court may abstain under Younger. Doran v. Salem Inn, Inc., 422 U.S. 922, 929 (1975). In the present case, the district court had taken no

action on the substance of USAA's claim when administrative proceedings commenced.

This court has held that "where federal intervention into state administrative proceedings would be substantial and disruptive, and where the proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests, the district court, pursuant to Younger, should abstain." Williams v. Red Bank Board of Education, 662 F.2d 1008, 1017 (3d Cir. 1981) (emphasis added). The Supreme Court, however, held in Hawaii Housing that administrative proceedings that are not part of, and are not themselves, judicial proceedings, do not trigger Younger abstention. 467 U.S. 238. In Hawaii Housing an administrative arbitration proceeding, by statute, was separate from any subsequent judicial

condemnation proceeding. In the present case, where an administrative decision to revoke USAA's insurance license could be appealed through the Pennsylvania courts, it is more difficult to determine whether the administrative proceeding is part of the state's judicial process.

USAA's federal claims are of constitutional dimension. As this court stated in Red Bank, administrative proceedings suffice for Younger purposes only when they "are adequate to vindicate federal claims." The Supreme Court has held that administrative proceedings that are forbidden by state law from considering federal constitutional claims will not invoke Younger because there is no "adequate opportunity in the state proceedings to raise constitutional challenges." Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S.

423, 432 (1982). We believe a state administrative proceeding is part of its judicial process, for Younger purposes, only if it provides an adequate opportunity to raise constitutional challenges.

It appears to be settled law in Pennsylvania that an administrative agency may not determine the constitutionality of the statutes it applies. Borough of Green Tree v. Board, 328 A.2d 819, 825 (Pa. 1974); Delaware Valley v. Commissioner, 389 A.2d 234, 237 (Pa. Comm. Ct. 1978). The insurance department in its internal documents has acknowledged this limitation. Because the insurance department in its administrative proceedings cannot consider USAA's constitutional arguments, its administrative proceedings are not part

of Pennsylvania's judicial process and the district court erred in abstaining under Younger.

VI.

We conclude that the district court erred in abstaining from considering USAA's preemption claim and dismissing its suit. The order of dismissal will be reversed and the case remanded to the district court for proceedings consistent with this opinion.

BECKER, Circuit Judge, concurring.

In [sic] concur in the judgment and in all but Part III.B of the majority's opinion. I write separately to explain my disagreement with one ground for the majority's holding that Pullman abstention is improper in this case. The majority states that the balance of

the interests disfavors abstention because the potential damage to United Services Automobile Association's ("USAA") business during state administrative and court proceedings outweighs the state interests in abstention. I disagree, however, and believe that such a holding may have dangerously broad implications.

There are certainly cases in which the burdens imposed upon a plaintiff by abstention outweigh the interests served by application of the Pullman rule and in which the balance of interests therefore counsels against abstention. However, I do not believe that this is such a case. The state administrative and judicial proceedings that USAA would face are no more cumbersome than the state procedures available to any state litigant. The fact that

USAA would have to receive an administrative ruling before it could present its case to a state court does not render its situation significantly more harmful than it if [sic] could proceed directly to federal court.[1] By permitting USAA to prevail on this argument, the majority creates a precedent that could allow virtually any litigant faced with relatively complex state litigation to avoid the application of the Pullman abstention doctrine.

USAA has convinced the majority that ongoing license revocation litigation would drastically damage its reputation and thus impair its marketing

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[1]This is especially true because the administrative hearing is over and the administrative decision will apparently be announced soon.

of insurance. I am not convinced, however, that the harm that such litigation would impose upon USAA is significantly different from or greater than the harm that important ongoing litigation imposes upon any litigant. For example, if a company were threatened with a large fine or penalty as the result of a state proceeding, the litigation might affect the value of its stock. Yet I do not believe that this predictable side-effect of litigation would justify a denial of Pullman abstention, if abstention were otherwise proper. In Bellotti v. Baird, 428 U.S. 132 (1976), the continuing existence of a statute that governed the type of consent required before an abortion could be performed on a woman under the age of eighteen imposed a substantial burden on individuals

to whom it applied. Although the Court acknowledged that "[e]ach day the statute is in effect, irretrievable events, with substantial personal consequences, occur," 428 U.S. at 151, it nevertheless held that abstention was proper. I do not believe that the type of harm that abstention would inflict upon USAA in this case is any greater than the type of harm caused to young women during that state litigation ordered in Bellotti v. Baird.

It is significant that, as the majority has pointed out, the insurance department has proposed ways of mitigating the harm that state litigation would impose upon USAA. It "has indicated a willingness to expedite consideration of USAA's claims in state procedures, and to agree to a stay of

execution in the event of an administrative decision adverse to USAA until judicial proceedings were completed." Maj. Op. at 11. Such expedition reduces the burden that resort to the state system creates for USAA. Cf. Bellotti v. Baird, supra. 428 U.S. at 150-51 (procedure for certifying issues directly to the state supreme court reduces relative burden of abstention, so that abstention is appropriate even in case in which the "importance of speed in resolution . . . is manifest"). The proposed stay of execution of a license revocation order also distinguishes this case from Pike v. Bruce Church, Inc., 397 U.S. 137 (1970), cited by the majority, in which the plaintiffs were subject to a state enforcement order which would impair their existing business activity.

Because I believe that the harm threatened to USAA is not significantly greater than the harm that state litigation would inflict upon any litigant, I believe that the majority's assessment of the balance of the interests in this case creates an exception that could swallow the abstention rule. Indeed, almost any litigant opposing Pullman abstention can make out a case as strong as USAA's. I think that the balance of the interests approach as a basis for avoiding Pullman abstention should be reserved for extreme cases, such as Pike v. Bruce Church, Inc., Supra, 397 U.S. at 139, in which an emergency situation was presented because the company faced an imminent loss of its cantaloupe crop

as a result of a state enforcement order, while only "a narrow and specific application" of a state statute was challenged as unconstitutional).[2]

I do, however, agree with the majority's other ground for holding that this is not a proper case for Pullman abstention: Pullman abstention should not be employed to avoid a ruling on a claim of federal preemption because such

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[2]Not only do I find that the harm that abstention would impose upon USAA in this case is not unusually great, but I also find that the countervailing state interest in interpreting its regulation is not unusually small. Unlike the situation in McKnight v. Southeastern Pennsylvania Transportation Authority, 583 F.2d 1229, 1241 (3d Cir. 1978), in which resolution of the constitutional issue before definitive state interpretation of a statute "would not upset sensitive state programs," federal intervention into the interpretation of Pennsylvania insurance regulations would be quite intrusive.

a claim does not call for substantial federal constitutional adjudication. I would base the holding on that ground alone.

A True Copy:

Teste:

Clerk of the United States Court of for the Third Circuit

EXCERPTS OF PENNSYLVANIA'S STATUTES GOVERNING JUDICIAL REVIEW OF COMMONWEALTH AGENCY ACTION

2 Pa.Cons.Stat.Ann.

Section 703. Scope of review

(a) General rule.--A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal, but such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.

* * * *

Section 704. Disposition of appeal

The court shall hear the appeal without a jury on the record certified by the Commonwealth agency. After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure

of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. §706 (relating to disposition of appeals).

RULE 1781, PA.RULE OF APPELLATE PROCEDURE

Stay Pending Action of Petition for Review

(a) Application to government unit. Application for a stay or supersedeas of an order or other determination of any government unit pending review in an appellate court on petition for review shall ordinarily be made in the first instance to the government unit.

(b) Contents of Application for stay or supersedeas. An application for stay or supersedeas of an order or other determination of a government unit, or for an order granting an injunction pending review, or for relief in the nature of preemptory mandamus, may be made

to the appellate court or to a judge thereof, but the application shall show that application to the government unit for the relief sought is not practicable, or that application has been made to the government unit and denied, with the reasons given by it for the denial, or that the action of the government unit did not afford the relief which the applicant had requested. The application shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the application shall be supported by sworn or verified statements or copies thereof. With the application shall be filed such parts, if any, of the record as are relevant to the relief sought.

(c) Notice and action by court. Upon such notice to the government unit as is required by Rule 123 (application for relief) the appellate court, or a judge thereof, may grant an order of stay or supersedeas, including the grant of an injunction pending review or relief in the nature of preemptory mandamus, upon such terms and conditions, including the filing of security, as the court or the judge thereof may

prescribe. Where a statute requires that security be filed as a condition to obtaining a supersedeas, the court shall require adequate security.

EXCERPTS OF PENNSYLVANIA JUDICIAL CODE

42 Pa.Cons.Stat.Ann.

Section 724. Allowance of appeals from Superior and Commonwealth Courts

(a) General rule.--Except as provided by section 9781(f) (relating to limitation on additional appellate review), final orders of the Superior Court and final orders of the Commonwealth Court not appealable under section 723 (relating to appeals from Commonwealth Court) may be reviewed by the Supreme Court upon allowance of appeal by any two justices of the Supreme Court upon petition of any party to the matter. If the petition shall be granted, the Supreme Court shall have jurisdiction to review the order in the manner provided by section 5105(d)(1) (relating to scope of appeal).

* * * *

Section 763. Direct appeals from government agencies

(a) General rule.--Except as provided in subsection (c), the Commonwealth Court shall have exclusive jurisdiction of appeals from final orders of government agencies in the following cases:

(1) All appeals from Commonwealth agencies under Subchapter A of Chapter 7 of Title 2 (relating to judicial review of Commonwealth agency action) or otherwise and including appeals from the Environmental Hearing Board, the Pennsylvania Public Utility Commission, the Unemployment Compensation Board of Review and from any other Commonwealth agency having Statewide jurisdiction.

(2) All appeals jurisdiction of which is vested in the Commonwealth Court by any statute hereafter enacted.

Supreme Court, U.S.
FILED
DEC 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-561

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

GEORGE F. GRODE, Insurance Commissioner
of the Commonwealth of Pennsylvania,
Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange, and
USAA CASUALTY INSURANCE COMPANY,
USAA LIFE INSURANCE COMPANY, and
USAA ANNUITY AND LIFE INSURANCE COMPANY,
Texas Stock Insurance Companies,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Where no adequate opportunity to raise federal challenges in state judicial proceedings existed because the federal plaintiffs would suffer "devastating economic consequences" from state administrative proceedings before their federal claims could be heard on appeal, did the Court of Appeals properly decline to abstain under *Younger*?

2. Should this Court review the Court of Appeals' factual "findings" of the devastating economic harm which would be caused by a *Pullman* abstention, especially where an alternate ground for not abstaining under *Pullman* was also present?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were William J. Muir, III, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, and the Respondents United Services Automobile Association, USAA Casualty Insurance Company, USAA Life Insurance Company, and USAA Annuity and Life Insurance Company.[1] The Petitioner before this Court is George F. Grode, the current Insurance Commissioner of the Commonwealth of Pennsylvania.

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1. The parent of Respondent USAA Casualty Insurance Company and Respondent USAA Life Insurance Company is Respondent United Services Automobile Association ("USAA"), a Texas Reciprocal Interinsurance Exchange. The parent company of the fourth Respondent, USAA Annuity and Life Insurance Company, is Respondent USAA Life Insurance Company. Respondent USAA Life Insurance Company has another subsidiary, USAA Life General Agency, Inc. Respondent USAA has the following subsidiaries in addition to the above-mentioned Respondents: USAA Consumer Services, Inc., USAA Special Services Company, USAA General Indemnity Company, USAA General Agency, Inc., USAA Limited, USAA Satellite Communications Company, USAA CAF Company, USAA Real Estate Company, USAA Investment Management Company and USAA Capital Corporation.

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No. 86-561

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

GEORGE F. GRODE,

Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
USAA CASUALTY INSURANCE COMPANY,
USAA LIFE INSURANCE COMPANY, AND
USAA ANNUITY AND LIFE INSURANCE COMPANY,

Respondents

RESPONDENTS' BRIEF IN OPPOSITION

Respondents United Services Automobile Association, USAA Casualty Insurance Company, USAA Life Insurance Company and USAA Annuity and Life Insurance Company respectfully request that this Court deny the petition for certiorari, seeking review of the Third Circuit's opinion in this case. The opinion is reported at 792 F.2d 356 (3d Cir. 1986).

STATUTES INVOLVED

Section 5(a) of the Home Owners' Loan Act of 1933, *as amended*, 12 U.S.C. §1464(a) provides:

> [T]he Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks, and to issue charters therefor, giving primary consideration to the best practices of thrift institutions in the United States.

STATEMENT OF THE CASE

United Services Automobile Association and its co-respondents (hereafter "USAA") are Texas-domiciled insurers duly licensed to transact insurance business in all fifty states, including Pennsylvania. USAA's member-policyholders are present and former officers in the United States armed forces — Army, Navy, Air Force and Marines. USAA, which does insurance business throughout the nation, received over $35,000,000 in premiums from its 40,000 Pennsylvania policyholders in 1983 alone.

USAA through a subsidiary applied for and obtained a federal charter and all necessary approvals from both the Federal Home Loan Bank Board (the "Board") and the Federal Savings and Loan Insurance Corporation (the "FSLIC") to establish, own and operate a new federal savings bank to be known as the USAA Federal Savings Bank (the "Bank") in San Antonio, Texas. In that process, these federal agencies were fully informed of USAA's deep involvement in the insurance business. Both these agencies approved the ownership of the Bank within the USAA group of companies, and imposed certain operational limitations and conditions on USAA. (1A-10A.)[2] The federal charter was issued and the new federal bank commenced its operations December 31, 1983.

The Bank has no operations, accepts no deposits, and does no business in Pennsylvania. (Pet. App. 46a, 3a.)

Regulation of the ownership, incorporation and operation of banks in the federal savings and loan system lies within the exclusive control of Congress and its designated agencies, the Board and the FSLIC. *See Fidelity Federal Savings and Loan Association v. de la Cuesta,*

2. References marked as (____A) refer to page ____A in the attached Appendix of respondents. References to Petitoner's Appendix are, e.g., Pet. App. __a.

458 U.S. 141, 160 (1982); 12 U.S.C. §1464(e); 12 C.F.R. §§541 *et seq.*

In mid-1984, the Pennsylvania Insurance Department notified USAA that its ownership of the Bank, although approved by the two federal agencies, was prohibited by Section 641 of the Pennsylvania Insurance Department Act of 1921, as amended, 40 P.S. §281. Section 641(b) prohibits insurers licensed to do business in Pennsylvania from owning or being affiliated with any "lending institution, . . . bank holding company [or] savings and loan holding company." 40 P.S. §281(b). Petitioner's Insurance Department then advised USAA of its choices: it must either divest itself of its new federal savings bank (in which USAA had invested over $20,000,000), or face revocation of its Pennsylvania insurance licenses and attendant loss of its substantial (over $35,000,000 in annual premiums) Pennsylvania insurance business.

Faced with this conflict between its federally-approved bank ownership and the prohibitions of Pennsylvania law, USAA commenced this civil rights action in federal court under 42 U.S.C. § 1983. The suit, filed on November 27, 1984, sought declaratory and injunctive relief against Pennsylvania's Acting Insurance Commissioner (hereafter "Commissioner" or "petitioner"), the state official responsible to enforce Pennsylvania's insurance laws. No state proceeding of any sort was then pending.

The Complaint's Supremacy Clause challenge did not attack the facial validity of Section 641(b) but averred that the statute was unenforceable if and as applied to USAA's affiliation with the Bank, because the organization, ownership, and operation of that Bank (and its parent savings and loan holding company) are preempted from state regulation by the Home Owners' Loan Act of 1933, as amended, 12 U.S.C. §1461 *et seq.*, by the National Housing Act, as amended, 12 U.S.C.

§§1730, 1730a, the regulations implementing these statutes and by federal agency actions thereunder. The Complaint also raised several issues of pure constitutional interpretation under the Commerce, Equal Protection and Due Process Clauses of the United States Constitution.

On December 24, 1984, the Commissioner's Insurance Department commenced an administrative license revocation proceeding by issuance of a Show Cause Order, alleging that USAA was in violation of Section 641 and that revocation of all respondents' insurance licenses was required. (1A-16A.) Under applicable Pennsylvania procedure, the Commissioner himself will decide the outcome of this proceeding. On the same day, counsel for the Commissioner filed in the district court a Motion to Dismiss the federal Complaint on grounds of *Pullman* and *Burford* abstention only, urging that the pendency of the license revocation proceedings (commenced only that same day) warranted such abstention. The Commissioner's own internal documents, obtained in discovery, showed that the administrative proceedings were themselves instituted, as later noted by the Court of Appeals (Pet. App. 74a), to defeat federal jurisdiction.

On January 25, 1985, USAA filed in the District Court a Motion for Summary Judgment on Preemption Grounds. USAA also filed a Motion for Preliminary Injunction to enjoin the revocation proceedings and briefed both motions. These motion papers advised the district court of the devastating economic harm which a license revocation order would cause USAA in the marketplace. The district court never addressed these motions.

Instead, relying on the pendency of the Insurance Department's administrative proceedings and various abstention doctrines, including the *Younger* doctrine

(never argued or briefed), the district court on September 30, 1985 abstained and dismissed respondents' Complaint. The district court identified a single state interest to be served by abstention—the state's authority to regulate the insurance industry as manifested by the McCarran-Ferguson Act, 15 U.S.C. §1011 *et seq.*

USAA then filed an Application for Injunction Pending Appeal, setting forth the substantial economic loss and harm which would result from license revocation, even if a revocation order were stayed pending appeal. After denial by the district court, the Court of Appeals, per Judges Hunter and Garth (Mansmann dissenting) granted the injunction on November 22, 1985. (22A.)

The Third Circuit reversed the district court. Finding from the facts presented that USAA would suffer "devastating economic consequences" (Pet. App. 62a) from a license revocation order even if stayed pending appeal to a state court[3], the Court of Appeals held abstention inappropriate. The economic consequences and harm which the lower court found would be caused by abstention and license revocation were detailed at length. (Pet. App. 61a-62a.)

Because of this harm, the Court of Appeals in its *Pullman* discussion held that "the district court erred by holding that state appeal and supersedeas procedures adequately protected USAA's interests." (Pet. App. 77a.) The Third Circuit's *Younger* discussion emphasized by use of italics that *Younger* abstention would have been appropriate only if the state's appeal and supersedeas procedures "*were adequate to vindicate [USAA's] federal claims.*" (Pet. App. 75a.)

Moreover, the Third Circuit rejected the district court's holding that a countervailing state interest might

3. Petitioner's brief, acknowledging these findings, argues that "These 'findings' of potential damage by the Court of Appeals are no more than speculation, unsupported by the record." As pointed out *infra*, these findings of economic harm are not only supported by the record, but are uncontroverted.

be served by abstention. It concluded instead that Pennsylvania's interest in the regulation of the "business of insurance", properly understood under the guidelines established by this Court in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) and similar cases, was not implicated by the affiliation between USAA and the Bank. (Pet. App. 70a-72a.) In fact, the Court of Appeals expressed skepticism whether abstention would serve any Pennsylvania state interest whatever given the unusual facts of this case, referring to "the vague claim of risks to the state from a Texas bank not doing business in Pennsylvania." (Pet. App. 62a.)

Finally, the Third Circuit, recognizing the substantial conflict shown by USAA's Supremacy Clause claim (viz.: Congress' broad grant of plenary authority to *federal* agencies to determine who shall own, manage and operate banks within the Federal Savings and Loan System, versus Pennsylvania's insistence that USAA surrender that ownership or suffer a multimillion dollar loss of all its Pennsylvania business), held on an alternative ground that *Pullman* abstention was inappropriate here, where a strong federal preemption claim, involving no substantive constitutional interpretation, was present. (Pet. App. 63a-68a.)

The Commissioner thereafter did not seek to stay or recall the Third Circuit's mandate. Accordingly, this case was remanded to the district court. There, by order entered July 1, 1986, the district judge granted USAA a preliminary injunction against any administrative license revocation. The Commissioner did not appeal from that injunction. Instead, he announced in mid-August 1986 an intention to seek a writ of certiorari from this Court.

At the present time the only extant state proceeding (albeit enjoined) is the administrative license revocation proceeding pending before the Commissoner.

SUMMARY OF ARGUMENT

The Court of Appeals for the Third Circuit declined *Pullman* and *Younger* abstention after concluding that abstention in this case would cause the federal plaintiffs "devastating economic consequences" against which state appeal and supersedeas procedures were inadequate remedies.

The Third Circuit's *Younger* decision is not in conflict with this Court's later decision in *Ohio Civil Rights Commission et al. v. Dayton Christian Schools, Inc. et al.*, 106 S. Ct. 2718 (1986). *Dayton* emphasized that *Younger* abstention requires "an adequate opportunity" to vindicate federal claims in the state proceedings. In this case, no such adequate opportunity existed because the federal plaintiffs would suffer "devastating economic consequences" before their federal claims could be resolved.

This Court also need not review the lower court's *Pullman* decision, which squarely rested on its "findings" of the economic harm of abstention, especially in view of the presence of an alternate ground for its *Pullman* decision.

ARGUMENT

I. Unlike *Dayton Christian Schools*, The Decision Below Turned On A Factual Finding That Respondents Would Suffer "Devastating Economic Consequences" If The District Court Were To Abstain Under *Younger*.

In *Ohio Civil Rights Commission et al. v. Dayton Christian Schools, Inc. et al.*, 106 S. Ct. 2718 (1986) (hereafter "*Dayton*"), decided three weeks after the Court of Appeals' decision in this case, this Court held *Younger* abstention appropriate to allow the Ohio Civil Rights Commission to conduct an investigation into whether there was probable cause for a hearing on charges of a discriminatory discharge of a teacher.[4] The record in *Dayton* showed that the Ohio Commission had been sensitive to first amendment (i.e. religious) justifications for otherwise illegal discrimination and had sometimes dismissed complaints of religious discrimination after considering such justifications. Absent any suggestion that appellee Dayton Christian Schools would suffer great or irreparable injury from such administrative proceedings, and noting that the school's constitutional objections to any administrative remedy could certainly be presented on appeal to a state court, this Court approved a *Younger* abstention, saying: "We . . . have no reason to doubt that Dayton will receive an adequate opportunity to raise its constitutional claims." 106 S. Ct. at 2723-24.

By contrast, the precise opposite is true here. Here, the Third Circuit found that USAA would suffer "devastating economic consequences" before its federal claims could be resolved. (Pet. App. 62a.) The reason is that Pennsylvania is not here engaging in a mere investigation, as Ohio was in *Dayton*. Rather, Pennsylvania is

4. Under the administrative scheme, only after finding probable cause might a hearing be held on the charges.

here seeking the harshest of sanctions, a license revocation order, which will devastate USAA's impeccable reputation with consumers and financial institutions, frighten away policyholder renewals, suggest fraudulent activity or financial instability in the marketplace, and impair USAA's ability to represent that its policies are available nationally to the highly mobile group of armed forces officers who comprise its member-policyholders. As the Third Circuit found, a supersedeas or stay will not ameliorate these economic consequences, because of the unique nature of the proceedings at issue below.[5]

Given these unusual facts, the Court of Appeals was properly unable to find, for *Younger* purposes, that Pennsylvania's state judicial process provided USAA an "adequate opportunity" to present its federal claims in state court. Accordingly, abstention was held inappropriate.

That this is so is demonstrated by the Third Circuit's discussion of its reasons for not abstaining under *Younger*.[6] The Third Circuit took care to italicize in its opinion (Pet. App. 75a) that *Younger* abstention is appropriate only where "*the [state] proceedings are adequate to vindicate federal claims.*" By use of such emphasis, it is clear that the Court of Appeals was focusing upon the adequacy of USAA's opportunity to "vindicate" its federal claims in the state proceedings.

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5. In *Gibson v. Berryhill*, 411 U.S. 564 (1973), a case cited in *Dayton*, the economic and reputational harm there to be caused by an administrative delicensing order led this Court to dismiss the argument — similar to petitioner's here — that later state court review sufficed to provide the necessary "adequate" opportunity for resolution of the federal challenges. 411 U.S. at 577.

6. Consistent with the fact that the Commissioner's abstention motion had relied only on *Pullman* and *Burford* abstention (*Younger* abstention was added to the district court's opinion *sua sponte*), the Commissioner gave *Younger* abstention little emphasis in the lower courts.

This focus is of course utterly consistent with this Court's teaching in *Dayton* and its predecessor cases. This Court made clear in *Dayton* that *Younger* abstention may apply to administrative proceedings only if the federal plaintiff has "a full and fair opportunity" to litigate his constitutional claim. 106 S. Ct. at 2723. The crux of the Third Circuit's holding was precisely that where the particular administrative proceedings afforded the federal plaintiffs no opportunity to raise federal challenges until after they have suffered what the court had already found would be devastating economic consequences, such opportunity could hardly be deemed "adequate." Thus, such proceedings should not be treated as part of the state's judicial process for *Younger* purposes.[7]

The Commissioner begins his contrary argument by flatly saying that "The Court of Appeals reversed the District Court's holding that *Younger* abstention was proper for one reason only — USAA could not raise constitutional claims during its administrative proceeding before the Insurance Department and therefore that proceeding was not a part of the state's judicial process for *Younger* purposes." (Petition, at 27.) This argument ignores much of the Third Circuit's opinion and misconceives the true basis for the decision. What the Court of Appeals actually said was that:

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7. The inappropriateness of abstention where such abstention will cause devastating economic consequences is not only consistent with *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 140 n.3 (1970), cited by the Third Circuit, but also with *Younger*'s roots in the equitable doctrine that federal injunctions were permissible against pending state proceedings if needed to prevent great and immediate irreparable harm. Here, the devastating economic harm which USAA will suffer has been amply recognized both by the majority of the Court of Appeals panel (Pet. App. 59a-62a), and by Circuit Judges Hunter and Garth in issuing the injunction pending appeal.

> We believe a state administrative proceeding is part of its judicial process, for *Younger* purposes, *only if it provides an adequate opportunity to raise constitutional challenges.*

(Pet. App. 77a.) (Emphasis added.) In evaluating this crucial question of the adequacy of the available state procedures, the Court of Appeals, as already set forth under its *Pullman* discussion (Pet. App. 62a), had reasoned as follows:

> Weighing the legal issues and the devastating economic consequences a license revocation would impose upon USAA on the one hand and the vague claim of risks to the state from a Texas bank not doing business in Pennsylvania we conclude that the *district court erred by holding that state appeal and supersedeas procedures adequately protected USAA's interests.*

(Emphasis added.)

In short, given its finding that USAA's interests (in having a full and fair opportunity to resolve its federal claims) were not adequately protected from devastating harm by the available state appeal and supersedeas procedures, the Court of Appeals' further determination that the federal claims could not be resolved in the Insurance Department's own proceeding meant, inevitably, that abstention was inappropriate. Hence the court held that, given the facts found in this case, the state's administrative proceedings should not be considered part of the state's judicial process for *Younger* purposes.

Finally, subsequent events have made a *Younger* abstention even more inappropriate.[8] Because of the Commissioner's failure either to stay or to recall the Third

8. These developments may be considered in reviewing *Younger* abstention questions. *See, e.g., Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982).

Circuit's mandate, this case was remanded to the district court and further proceedings have been occurring. On July 1, 1986, after further briefing and oral argument, the district court issued a preliminary injunction in favor of USAA because the court found, *inter alia*, a likelihood that respondents would succeed on the merits of their preemption and other claims. The Commissioner took no appeal. The district court fixed a briefing schedule and USAA and the Commissioner have since filed supplementary briefs on the issues raised in USAA's summary judgment motion on preemption grounds. Only after such further proceedings did the Commissioner's counsel in mid-August 1986 reveal an intention to seek a writ of certiorari in this Court. But the federal action by then, with the Commissioner's full acquiescence, had "proceeded well beyond the 'embryonic stage'." Ordinarily, "considerations of economy, equity and federalism counsel against *Younger* abstention at that point." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 238 (1984). Given that the Commissioner himself permitted the federal machinery to proceed to and beyond the issuance of a preliminary injunction by the district court, his request that this Court now grant certiorari to permit a possible *Younger* abstention is unwarranted. If a federal injunction against further administrative proceedings had really prejudiced Pennsylvania or its Insurance Commissioner, there would have been greater effort to use the remedies available to prevent it.[9]

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9. Another reason to decline *Younger* abstention is the Third Circuit's conclusion, made in the context of its *Pullman* analysis (Pet. App. 63a-68a), that abstention is often inappropriate where the federal plaintiff presents a substantial preemption challenge. *See Capital Service, Inc. v. NLRB*, 347 U.S. 501 (1954) (abstention inappropriate where federal government has preempted field of labor policy). Here, the conflict presented is whether ownership of a federal savings and loan in Texas shall be determined by the Federal Home Loan Bank Board and the FSLIC (which, as this Court said in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. at 160, have "plenary authority" over such matters) or whether

II. The Court of Appeals' Alternative Reasons For Declining *Pullman* Abstention Do Not Warrant Review.

The Commissioner challenges both of the Third Circuit's alternative reasons for not abstaining under the *Pullman* doctrine. Neither challenge presents important questions and neither has merit.

A. The Third Circuit's *Pullman* Decision Rests Squarely On Its "Findings" Of The "Devastating Economic Consequences" Of Abstention.

In Part III-B of its opinion, the Court of Appeals held *Pullman* abstention inappropriate because the "devasting economic consequences" of abstention outweighed the state's countervailing interest in abstention.

In this regard, Commissioner Grode complains of what he admits were the "findings" (Petition at 43) of the Third Circuit that USAA will suffer "devastating economic consequences" from the outcome of the license revocation proceedings, even if a stay of the license revocation order were granted. *Cf. Pike v. Bruce Church, Inc.*, 397 U.S. 137, 140 & n. 3 (1970) (no abstention

NOTES (*Continued*)

such ownership shall be forcibly divested by the state of Pennsylvania (through its threatened use of delicensing power). The lower courts have consistently held that the presence of a substantial preemption challenge weighs against *Younger* abstention. *Middle South Energy, Inc. v. Arkansas Public Service Comm.*, 772 F.2d 404, 417 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986) (the legitimate state interest contemplated by *Younger* "does not exist when the state action has been preempted"); *Champion Int'l Corp. v. Brown*, 731 F.2d 1406, 1409 (9th Cir. 1984) ("Montana has no cognizable state interest in enforcing those age discrimination laws that are preempted by Federal law"); *Baggett v. Dept. of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983) (abstention inappropriate when "assertion of preemption went to the jurisdiction and power of the state administrative agency to proceed at all"); *Kentucky West Va. Gas Co. v. Pa. P.U.C.*, 791 F.2d 1111, 1117 (3d Cir. 1986) (*Younger*'s respect for comity is "not strained when federal court cuts off state proceedings that entrench upon the federal domain.")

where allegedly unconstitutional state regulation threatened $700,000 crop loss); *Gibson v. Berryhill, supra* (nonabstention approved where unconstitutional administrative license revocation proceeding would harm federal plaintiff). But his complaint that such findings were unsupported by the district court record is simply incorrect. To begin with, evidence of the harm of license revocation was presented to the district court by affidavit with USAA's Motion for Summary Judgment on Preemption Grounds (filed January 25, 1985). This harm was also discussed in USAA's Supplemental Brief Opposing Defendant's Abstention Motion at pp. 2-3 (filed March 1, 1985), in USAA's Memorandum Of Law In Support Of Motion For Preliminary Injunction at pp. 6-12 (filed July 11, 1985), and, after the Commissioner offered to agree to a supersedeas, was further elaborated on to the district court by the affidavit supporting USAA's Application for Injunction Pending Appeal (17A-21A) (filed October 7, 1985). Just as important, the Commissioner and his Insurance Department have never contested the devastating economic consequences of a license revocation order even if stayed, and never offered any contrary evidence.[10]

Nor can such findings be deemed "speculative", as the Commissioner suggests. Indeed, less impressive findings of harm were relied on by this Court in rejecting abstention in *Gibson v. Berryhill, supra*. In *Gibson*, state officials had sought abstention in favor of a state administrative proceeding to revoke a medical license. A three-judge district court found that, because of administrative bias, the federal plaintiffs had no meaningful opportunity to present their federal challenge to the state statute in the revocation proceeding. The state officials con-

10. Indeed, the Commissioner acknowledged on page 19 of his Brief In Opposition To Motion For Preliminary Injunction filed in the district court on September 23, 1985: "Defendant does not dispute that revocation of the license(s) of plaintiffs would create problems for plaintiffs."

tended that such an opportunity nonetheless would be provided by *de novo* review in a state court from an administrative delicensing order. This Court rejected such contention. In upholding the district court's refusal to abstain, this Court pointedly referred to the lower court's finding, similar to those in this case, that:

> [T]he revocation by the Board of appellees' licenses to practice their profession, "together with the attendant publicity which would inevitably be associated therewith, would cause irreparable damage" to the appellees for which no adequate remedy is afforded by state law.

411 U.S. at 577 n.16.[11] The Third Circuit's rejection of *Pullman* abstention here was consistent with this Court's decision in *Gibson*.[12]

B. The Court Of Appeals' Alternate *Pullman* Ground Presents No Conflict With Other Decisions.

The Commissioner finally argues against the Third Circuit's alternate holding that *Pullman*-type abstention is inappropriate in this case in light of USAA's substantial[13] preemption claim. Contrary to Commissioner

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11. This Court ultimately did decide to abstain in *Gibson* for other reasons.

12. The Commissioner also overlooks that *Pullman* abstention was also inappropriate for lack of an important countervailing state interest. The Third Circuit rightly rejected the only important state interest ever posited by the Commissioner, saying "Regulations such as Section 641 have no place in the business of insurance under McCarran-Ferguson". (Pet. App. 69a-72a.) Indeed, given that the USAA Federal Savings Bank does no business in Pennsylvania and is located in Texas, the Court of Appeals was skeptical of the existence of any Pennsylvania interest to be served by abstention, referring to petitioner's "vague claim of risks to the state from a Texas bank not doing business in Pennsylvania. . . ." (Pet. App. 62a.) This lack of an important state interest is another reason for denying *Younger* abstention in this case.

13. That USAA's preemption claim is a substantial one is underlined by the district court having granted USAA a preliminary

Grode's suggestion, this holding is not in conflict with this Court's decision to abstain in *Lake Carriers' Assoc. v. MacMullan*, 406 U.S. 498 (1972). The parties in *Lake Carriers* had agreed that federal regulations promulgated under the federal Water Quality Improvement Act would preempt the Michigan Watercraft Pollution Control Act, but only *once those federal regulations were issued and became effective* (which this Court found would be some years in the future). The justiciable controversy in that case was limited to whether the Michigan statute was constitutionally enforceable in the interim period before the federal regulations even became effective. *Id.* at 504-508. Abstention in *Lake Carriers* simply permitted Michigan to resolve its immediate state law ambiguities without risking collision with the existing federal regulatory scheme.[14]

For these reasons, this Court in *Lake Carriers* had no occasion to decide or even to discuss whether a preemption claim presents a substantial constitutional question for *Pullman* purposes. By contrast, this Supremacy Clause issue had to be considered in weighing abstention here because it was immediate and substantial: according to the Commissioner, the Pennsylvania

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NOTES (*Continued*)

injunction on July 1, 1986, reflecting that court's belief after full briefing and argument that USAA showed a substantial likelihood of success on the merits. Moreover, as this Court itself has pointed out in *Fidelity Federal*, *supra* at n.9, the Ninth Circuit has concluded that "the regulatory control of the [Federal Home Loan] Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control." *Conference of Federal Savings and Loan Associations v. Stein*, 604 F.2d 1256, 1260 (9th Cir. 1979), *summarily aff'd*, 445 U.S. 921 (1980).

14. In *Lake Carriers*, however, this Court considered it settled for purposes of defining the jurisdiction of three-judge courts, that Supremacy Clause claims were not "constitutional" claims, and that such preemption claims could only be decided under the *pendent* jurisdiction of such courts if a nonfrivolous "constitutional" claim was also present. 406 U.S. at 504 n.5.

statute (Section 641) prohibited the very affiliation already approved by the federal agencies having plenary regulatory jurisdiction.

Nor does the Third Circuit's decision conflict with those of other circuit courts. In *Aluminum Co. of America v. Utilities Comm'n*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), cited by the Commissioner, the court's holding was not on *Pullman* grounds, but on *Burford* grounds. Moreover, the Fourth Circuit there merely declined to adopt Alcoa's *per se* argument that *Burford* abstention is *never* appropriate if a federal plaintiff asserts a preemption claim. Indeed, the Fourth Circuit, recognizing that a substantial preemption claim often counsels against abstention, said:

> We decline to adopt such a *per se* rule. The presence of a preemption claim, however, may in some cases require a refusal to abstain. . . . For example, abstention is inappropriate where the federal government has preempted the field . . . or where there is a direct, facial conflict between state and federal statutes. . . . In such cases, the basic premise of abstention — avoiding needless federal court intervention into important matters within the state's jurisdiction to regulate — obviously is lacking. The challenged state action clearly conflicts with preemptive federal law.

Id. at 1030 (citations omitted). In short, the Fourth Circuit's view that a substantial preemption claim is a factor which weighs against a *Pullman* abstention is consistent with the Third Circuit's opinion in this case.

The last two cases relied on by petitioner to show a conflict in the circuits are also inapposite. Neither *Druker v. Sullivan*, 458 F.2d 1272 (1st Cir. 1972) nor *City Investing Co. v. Simcox*, 633 F.2d 56 (7th Cir. 1980), addressed whether a preemption claim should be deemed a substantial constitutional question for *Pullman* purposes, because both cases turned on their own

peculiar facts. In *Druker*, the First Circuit simply allowed an abstention decision to stand because of its need for state court interpretation of unusually complex state legislation, legislation which the First Circuit variously referred to as "a riddle", and "a draftsman's corkscrew." *Id.* at 1276. And in *City Investing Co., supra*, there simply was no contention made that the federal plaintiffs' preemption claim was not a substantial constitutional claim for *Pullman* purposes.

On the other hand, as fully reviewed in Part III-C of the Third Circuit's opinion, the Ninth Circuit and Tenth Circuit Courts of Appeals have expressly addressed and discussed this issue. *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374, 377 (9th Cir. 1982); *Federal Home Loan Bank Board v. Empie*, 778 F.2d 1447, 1451 n.4 (10th Cir. 1985). These Ninth and Tenth Circuit decisions are consistent with the Third Circuit's present decision. There is no conflict among the circuits.[15]

The Commissioner also argues that this and other courts have viewed Supremacy Clause claims as "constitutional" claims. But the holdings in the cases cited by the Commissioner do not support this view. Instead, they show that Supremacy Clause claims are often considered "statutory" or "non-constitutional", depending upon the purpose such labels would serve. For example, in *Hagans v. Lavine*, 415 U.S. 528 (1974), this Court clearly recognized that preemption claims are to be considered "statutory" claims for purposes of analyzing the jurisdiction of three-judge courts. Indeed, in that case

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15. The Commissioner also complains that the Third Circuit's *Pullman* decision would allow "any plaintiff" to "defeat an otherwise appropriate abstention simply by appending a Supremacy Clause claim." This argument lacks merit. Such argument would have been correct only if the Third Circuit had adopted a *per se* rule that *Pullman* abstention is *never* appropriate if any preemption claim is present.

this Court pointed out, in language since used for guidance by lower courts in abstention cases that, "where the Supremacy Clause is implicated: 'the federal courts are particularly appropriate bodies for the application of preemption principles.' " 415 U.S. at 550. And consistent with *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), relied on by the court below, a preemption claim in another case cited by the Commissioner (*International Brotherhood of Electrical Workers v. Public Service Commission*, 614 F.2d 206 (9th Cir. 1980)) was held to be a nonconstitutional statutory claim. *Id.* at 211.

In summary, this case, like *Pike v. Bruce Church, Inc.*, *supra*, and *Gibson v. Berryhill*, *supra*, but unlike *Dayton*, presents findings that devastating and irreparable harm will be suffered before the federal plaintiff has an opportunity to have his federal claims resolved in the state court system. This Court decided in *Gibson* that, when such unique facts are present, the administrative proceeding (with its right of appeal) may well not afford the delicensed federal plaintiff an adequate opportunity to litigate its federal or constitutional challenges. The Third Circuit's decision, which preceded *Dayton*, fully accords with this principle using the particular findings here present. No purpose would be served by review of these findings in this Court or by remand of this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied, in all respects.

Respectfully submitted,

Michael L. Browne
Christopher K. Walters*
J. Thomas Morris
Reed Smith Shaw & McClay
1600 Avenue of the Arts Bldg.
Broad and Chestnut Streets
Philadelphia, PA 19107

Robert B. Hoffman
Reed Smith Shaw & McClay
300 North Second Street
Harrisburg, PA 17108

Counsel for Respondents

*Counsel of Record
December 3, 1986

APPENDIX

FEDERAL HOME LOAN BANK BOARD

No. 83-708
Date: December 15, 1983

WHEREAS, the Federal Home Loan Bank Board has considered the record and merits of the application of Robert F. McDermott, et al., San Antonio, Texas, dated April 4, 1983, for permission to organize a new Federal stock savings bank to be known as "USAA Federal Savings Bank" to be located at, or in the immediate vicinity of, Huebner Road and Interstate 10, San Antonio, Texas; and

WHEREAS, it is determined that the applicants are persons of good character and responsibility, that there is a necessity for such an association in the area to be served, that there is a reasonable probability of its usefulness and success, and that it can be established without undue injury to properly conducted existing thrift and home-financing institutions; and

WHEREAS, the Board has, as required by the Community Reinvestment Act of 1977, taken into account the applicant's proposed statement to meet the credit needs of the entire community it will serve, including the low- and moderate-income neighborhoods therein;

WHEREAS, in a related filing the United States Automobile Association has applied to acquire 100% of the shares to be issued by the USAA Federal Savings Bank; and whereas any approval of said holding company application would be subject to the condition that USAA and any subsidiary thereof agree not to engage in investment banking activities and to restrict activities related to securities brokerage and advising mutual funds to less than 5% of USAA's assets on a consolidated basis;

THEREFORE, IT IS HEREBY RESOLVED, that said application is hereby approved provided that the following conditions are complied with in a manner satisfactory to the Supervisory Agent at the Federal Home Loan Bank of Dallas not later than six months from the date of this

Resolution, unless, prior to the expiration of such period, a request to the said Supervisory Agent for an extension of such time limit shall have been received and granted; provided further that, except as herein required, there have been no substantial changes in the information currently before the Board relating to said applicant; and provided further, that there has been received no additional information having an adverse bearing on any feature of the application, and that the applicant has:

1. Submitted, to the Supervisory Agent, one signed and three conformed copies of such proposed charter and bylaw along with a certification by the secretary of the association that the charter conforms to Section 552.3 of the Federal Regulations and the bylaws contain sufficient provisions to govern the association in accordance with the requirements of Section 552.6 through 552.6-4 of the Federal Regulations and shall not contain any provision which is inconsistent with applicable laws, rules, regulations, or the charter, and has submitted such documentation to the said Supervisory Agent for approval;

2. Amended, if necessary, all security forms to conform with the Rules and Regulations for Insurance of Accounts and has obtained approval from the Supervisory Agent for the issuance of the security forms;

3. Submitted a written opinion of its counsel that the securities adopted by the association can be legally issued under applicable law and regulations and its charter and bylaws;

4. Not opened for business prior to compliance with all rules and regulations of Federal and State law;

5. Submitted, in a form satisfactory to the Supervisory Agent at the Federal Home Loan Bank of Dallas, a comprehensive business plan covering a period of three years. The Supervisory Agent shall monitor the applicant's progress in implementing the business plan for a period of three years;

6. Upon issuance of a Federal charter, submitted evidence that all funds collected on subscriptions are adequately safeguarded and that all Rules and Regulations of the Federal Savings and Loan System and other applicable Federal laws and regulations have been complied with;

7. Obtained blanket bond coverage from an approved surety company, in at least the amount required by the Insurance Regulations;

8. Obtained approval from the office of General Counsel at the Federal Home Loan Bank Board of the offering circular prior to the issuance of any stock in the Federal Savings Bank, or if an exception is claimed, a copy of the legal opinion regarding the proposed offering and any information required for non-public offerings;

Installed, or arranged to install, a modern system of accounting and supporting records, including standards substantially equivalent to those contained in the Standard Accounting Manual and an adequate system of internal checks and controls;

10. Established permanent nonwithdrawable capital and paid-in surplus aggregating at least $3,000,000, which amount is to be divided between permanent stock and paid-in surplus in a manner satisfactory to the Corporation;

11. Submitted a certification to the Supervisory Agent of the adoption by the stockholders of the institutions's proposed stock option plan;

12. Received the approval of the Principal Supervisory Agent, pursuant to Section 563.41 of the Insurance Regulations, of any real property transactions between the association and USAA for its office quarters;

13. Executed and submitted an agreement with the Corporation which shall provide that, in consideration of the granting of insurance of its accounts, the operating policies as hereinafter set forth as requirements for insurance shall be effective as of the date of insurance of its accounts and shall remain in full force and effect as long as its accounts are insured by the Corporation, unless, with the written approval of the Corporation, a change therein is made, said agreement to include provisions, satisfactory to the Corporation:

(a) The composition of the institution's management shall comply with the provisions of: (1) the Depository Institutions Management Interlocks Act of 1978, as amended, (2) the regulations implementing that Act, (3) Section 563.33 of the Rules and Regulations for Insurance of Accounts ("Insurance Regulations"), (4) the Change in Savings and Loan Control Act and the Savings and Loan Holding Company Act (both of which require prior notice and approval for acquisitions and changes of control of FSLIC insured stock institutions) and (5) any future statutory or regulatory changes related to the composition of the institution's management;

(b) The institution shall adopt a home financing policy which is consistent with economical home financing and the purposes of Title IV of the National Housing Act;

(c) Lending plans and policies, covering lending territory, and origination of loans will be equally extended to all sources of origin; interest rates, premiums, service charges and other loan costs will be such as to enable the institution to obtain and hold the best loans available;

(d) The institution shall establish and maintain, at the proposed or other acceptable location, independent office quarters, accessible to the general public consistent with general industry practice, at which the association shall conduct its business, including the taking of deposits;

(e) The institution shall establish a construction loan procedure which includes the use and recording of adequate inspection reports on all properties securing such loans;

(f) The institution shall adopt loan appraisal practices and procedures conforming to the best established practices in the industry;

(g) The institution shall establish a procedure, with respect to hazard insurance coverage on all properties mortgaged to the institution, allowing mortgage borrowers a free choice in the selection of hazard insurance brokers or agents;

(h) Adequate internal checks and controls shall be established and maintained;

(i) A plan shall be adopted to ensure the continuation or succession of competent management in the event of the managing officer's incapacity or resignation;

(j) No dividend, other than a stock dividend on permanent nonwithdrawable capital, shall be paid if the net worth of the institution, as defined

in the Insurance Regulations, is or would become, as a result of the payment of such dividend, less than that required by Section 563.13 of the Insurance Regulations, as said section currently reads or may hereafter be amended;

(k) Any amount remaining in the paid-in surplus account after the absorption of any deficit shall remain as part of the permanent capital structure of the institution;

(l) Except with the Principal Supervisory Agent's prior approval, brokered deposits, including rollovers therefrom, shall be limited to five percent of the institution's deposit base for the period between the commencement of operations and the beginning of the first full fiscal year and for three years following the beginning of the first full fiscal year;

(m) A plan shall be adopted to ensure diversification of investments and avoidance of concentration in a particular type of investment and in a particular geographic location;

(n) The institution shall adopt a business plan, as described in Section 571.6(b) of the Insurance Regulations, which shall include provisions for the prior approval by the Principal Supervisory Agent of any material change in, or deviation from, the business plan during the period beginning with the commencement of operations and the beginning of the first full fiscal year and for the three years following the beginning of the first full fiscal year; and

(o) That the institution shall provide for employment of a qualified full-time executive managing officer, subject to approval by the Principal Supervisory Agent, on a salaried basis

who shall be charged with full administrative and managerial responsibilities of the institution under policies established by its board of directors. In the event of the managing officer's removal, incapacity or resignation during the period between the commencement of operations and the beginning of the first full fiscal year and for the three years following the beginning of the first full fiscal year, the continuation or succession of competent management will also be subject to the Principal Supervisory Agent's approval.

By the Federal Home Loan Bank Board

J. G. Finn
Secretary

December 28, 1983

George H. Ensley, President
USAA Financial Services Company
USAA Building
San Antonio, Texas 78288

Application by USAA Financial Services Company (FINCO), San Antonio, Texas (H-506), a subsidiary of the USAA group of companies, San Antonio, Texas, for permission to acquire control of USAA Federal Savings Bank (USAA Bank), San Antonio, Texas

Dear Mr. Ensley:

The subject application has been reviewed by this office in keeping with the provisions of Section 408(e) of the National Housing Act, as amended, and Section 584.4 of the Regulations for Savings and Loan Holding Companies.

Pursuant to the authority delegated to this office, the application is hereby approved, provided that the following conditions are complied with in a manner satisfactory to this office:

1. The proposed acquisition shall be consummated no later than 120 days after the date of this letter;

2. FINCO shall file an affidavit with the Supervisory Agent certifying to the consummation of the acquisition in accordance with the provisions of the

subject application and specifying the exact number of shares of stock of the insured institution acquired;

3. FINCO shall stipulate to the Bank Board that as long as it controls the subject institution, it will cause the net worth of USAA Bank to be maintained at a level consistent with that required by Section 563.13(a)(2)(ii)(a) of the Rules and Regulations for Insurance of Accounts for de novo institutions, and where necessary to infuse sufficient additional equity capital, in a form satisfactory to the Supervisory Agent, to effect compliance with such requirement;

4. FINCO shall stipulate to the Bank Board that, unless prior written approval has been obtained from the Supervisory Agent with the concurrence of the Director of the Office of Examinations and Supervision, dividends paid by USAA Bank in any fiscal year shall be limited to 50 percent of net income for that fiscal year, as reflected on its quarterly financial reports to the Bank Board, provided that any dividends permitted under this limitation may be deferred and paid in a subsequent year, but in no event may dividends be paid that would reduce the subject institution's net worth below the level required by the Insurance Regulations;

5. The USAA group of companies agree not to engage in investment banking activities and, specifically (1) agree not to underwrite corporate debt and equity securities; and (2) agree not to act as principal in the sale of corporate debt and equity securities.

6. USAA Investment Management Company and any other affiliate of the USAA group of companies that should become engaged in managing,

advising or servicing open end investment companies or become engaged in securities brokerage activities at some future date, agree that their aggregate assets will not exceed 5 percent of the assets of USAA on a consolidated basis.

7. The USAA group of companies may request relief from compliance with conditions 5 and 6, which will be granted if future legislative, judicial or regulatory action occurs which, in the Board's view, eliminates the need for imposition of the conditions.

Very truly yours,

Joseph E. Settle
Supervisory Agent

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BEFORE THE INSURANCE COMMISSIONER
OF THE
COMMONWEALTH OF PENNSYLVANIA

IN RE:	: ALLEGED VIOLATIONS:
	:
UNITED SERVICES AUTOMOBILE	: Section 641 of the Insurance
ASSOCIATION	: Department Act of 1921, Act of
USAA CASUALTY COMPANY	: May 17, 1921, P.L. 789, *as*
USAA LIFE INSURANCE	: *amended*, 40 P.S. §281.
COMPANY	:
USAA ANNUITY AND LIFE	:
INSURANCE COMPANY	:
USAA Building	:
San Antonio, TX 78288	: Docket No. C84-12-5

ORDER TO SHOW CAUSE

And Now, this 24th day of December, 1984, pursuant to the statutes captioned above and in accordance with 1 Pa. Code §35.14, Respondents are hereby ORDERED to appear at a formal administrative hearing before the Insurance Commissioner of the Commonwealth of Pennsylvania, or his duly designated Presiding Officer, and TO SHOW CAUSE why the Insurance Commissioner, upon consideration of the Factual Allegations pursuant to Applicable Law, and in accordance with Procedures cited herein, should not impose the specified Penalties, as said terms are described below.

It Is Hereby Ordered that Respondents file an Answer to this Order to Show Cause in writing within the time specified herein, in accordance with 1 Pa. Code §35.37. Such Answer shall specifically admit or deny each of the Factual Allegations made herein, and shall set forth the facts and state concisely the matters of law upon which Respondents rely. If Respondents fail to file an Answer within the time allowed herein, the Factual Allegations shall be deemed admitted, and the Insurance Commissioner may issue an Order imposing such Penalties as he deems appropriate.

FACTUAL ALLEGATIONS

1. Respondent United Services Automobile Association ("USAA") is a Texas-domiciled reciprocal insurance exchange with its principal place of business at USAA Building, San Antonio, Texas.

2. USAA is licensed in this Commonwealth to engage in the businesses of fire and allied insurance, inland marine and physical damage insurance, ocean marine insurance, general liability insurance, burglary and theft insurance, automobile liability insurance and personal property insurance pursuant to Subsections (b) (1), (2) and (3) and (c) (4), (6), (11) and (13) of Section 202 of the Insurance Company Law of 1921, Act of May 17, 1921, P.L. 687, *as amended*, 40 P.S. §382.

3. Respondent USAA Casualty Insurance Company is a Texas-domiciled stock insurance company with its principal place of business at USAA Building, San Antonio, Texas.

4. USAA Casualty Insurance Company is licensed in this Commonwealth to engage in the businesses of fire and allied insurance, inland marine and physical damage insurance, ocean marine insurance, general liability insurance, burglary and theft insurance, automobile liability insurance and personal property insurance pursuant to Subsections (b) (1), (2) and (3) and (c) (4), (6), (11) and (13) of Section 202 of the Insurance Company Law of 1921, Act of May 17, 1921, P.L. 687, *as amended*, 40 P.S. §382.

5. Respondent USAA Life Insurance Company is a Texas-domiciled stock insurance company with its principal place of business at USAA Building, San Antonio, Texas.

6. USAA Life Insurance Company is licensed in this Commonwealth to engage in the businesses of life insurance and annuities and accident and health insurance pursuant to Subsections (a) (1) and (2) of Section 202 of the Insurance Company Law of 1921, *supra*, 40 P.S. §382.

7. Respondent USAA Annuity and Life Insurance Company is a Texas-domiciled stock insurance company with its principal place of business at San Antonio, Texas.

8. USAA Annuity and Life Insurance Company is licensed in this Commonwealth to engage in the business of life insurance and annuities pursuant to Subsection (a) (1) of Section 202 of the Insurance Company Law of 1921, *supra*, 40 P.S. §382.

9. USAA Casualty Insurance Company, USAA Life Insurance Company and USAA Annuity and Life Insurance Company are wholly-owned subsidiaries of USAA.

10. USAA Financial Services Company (formerly known as USAA Development Company) is a wholly-owned subsidiary of USAA acting as the holding company for USAA's non-insurance subsidiaries.

11. On or about April 14, 1983, USAA Financial Services Company (then known as USAA Development Company), filed an application with the Federal Home Loan Bank Board for a *de novo* Federal Savings Bank Charter for the USAA Federal Savings Bank.

12. Concurrent with the aforementioned filing, USAA Financial Services Company (then known as USAA Development Company), filed with the Federal Savings and Loan Insurance Corporation an Application H(e) (1) to serve as a unitary savings and loan holding company.

13. The aforementioned applications were approved effective December 15, 1983, and the USAA Federal Savings Bank began operations on December 30, 1983.

14. As such, USAA, through its subsidiary, USAA Financial Services Company, currently owns and controls the USAA Federal Savings Bank.

15. As such, USAA constitutes a savings and loan holding company as defined by Section 641(a) of the Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, *as amended*, 40 P.S. §281(a).

16. As such, USAA Casualty Insurance Company, USAA Life Insurance Company and USAA Annuity and Life Insurance Company are subsidiaries of a savings and loan holding company as defined by Section 641(a) of the Insurance Department Act of 1921, *supra*, 40 P.S. §641(a).

APPLICABLE LAW

Based on the foregoing Factual Allegations, it is alleged that Respondents have violated the following statute: Section 641(b) of the Insurance Department Act of 1921, Act of May 17, 1921, P.L. 789, *as amended*, 40 P.S. §281(b), which states in its entirety:

> No lending institution, public utility, bank holding company, savings and loan holding company or any subsidiary or affiliate of the foregoing, or officer or employee thereof, may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this State either as a broker or as an agent except that a lending institution or bank holding company, subsidiary or affiliate of a lending institution may be licensed to sell credit life, health and accident insurance and to sell and underwrite title insurance in accordance with regulations promulgated by the Insurance Commissioner.

Reference should also be made to the following statutes and regulations:

1. Administrative Agency Law, 2 Pa.C.S. §§101-508 and §§701-704.

2. General Rules of Administrative Practice and Procedure, 1 Pa. Code §§31.1-35.193, 35.225-35.251.

3. Special Rules of Administrative Practice and Procedure, 31 Pa. Code §§56.1-56.3.

PENALTIES

After the Procedures set forth herein, if the Insurance Commissioner finds the Factual Allegations set forth herein to be true and correct, and determines that Respondents have violated any provision of Applicable Law, the Insurance Commissioner at his discretion may impose the following Penalty: Revocation of any and all insurance licenses issued by the Commissioner and currently held by Respondents.

PROCEDURES

The formal administrative hearing in this matter shall be held in accordance with the Administrative Agency Law, Act of April 28, 1978, P.L. 202 (2 Pa.C.S. §§101-508 and 701-704); General Rules of Administrative Practice and Procedure, 1 Pa. Code §§31.1-35.193, 35.225-35.251; Special Rules of Administrative Practice and Procedure, 31 Pa. Code §§56.1-56.3; and other relevant procedural provisions of law.

The hearing shall be held before the Insurance Commissioner of the Commonwealth of Pennsylvania, or his duly designated Presiding Officer, in accordance with 1 Pa. Code §35.185.

Respondents may appear, with or without counsel, and offer testimony or other evidence in their behalf.

In the event Respondents fail to respond to this Order to Show Cause or to appear at said hearing, the Factual Allegations contained herein shall be deemed admitted, and the Insurance Commissioner shall issue an Order imposing such Penalties cited herein as he, in his discretion, deems appropriate.

ORDER RETURNABLE at such time and place as shall be fixed for the convening of the formal administrative hearing on this Order to Show Cause. Answers, motions preliminary to those at hearing, protests, petitions to intervene, or notices of intervention, if any, must be filed in writing with the Docket Clerk, Insurance Department, Room 1342 Strawberry Square, Harristown State Office Building No. 1, Harrisburg, Pennsylvania 17120 no later than twenty (20) days from the date notice of this Order is published in the *Pennsylvania Bulletin*.

NOTICE of this Order to Show Cause shall be given by the Insurance Department by forwarding a copy by first-class mail to the Respondents named herein and by publication in accordance with 1 Pa. Code §35.105 and 31 Pa. Code §57.1.

/s/

JOHN J. SHEEHY
Chief Deputy Insurance Commissioner

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED SERVICES AUTOMOBILE ASSOCIATION, et al.	:	
	:	CIVIL ACTION NO. 84-1596
Plaintiffs,	:	
v.	:	
WILLIAM J. MUIR, III	:	
Defendant.	:	
STATE OF TEXAS	:	
	:	SS
COUNTY OF BEXAR	:	

AFFIDAVIT OF WILLIAM McCRAE IN SUPPORT OF APPLICATION FOR INJUNCTION PENDING APPEAL

William McCrae, being duly sworn, upon his oath deposes and says:

1. I am both Senior Vice President and Secretary of the United Services Automobile Association ("USAA") and am authorized to make this Affidavit on its behalf.

2. USAA has grown to become one of the largest, most successful and most reputable insurance companies in the United States. Its excellent reputation is evidenced by the September, 1984 issue of "Consumer Reports" which rates USAA as second highest in the country among automobile insurance companies with regard to claimants' overall satisfaction with the handling and settlement of claims. Additionally, the August, 1985 issue of "Consumer Reports" rates USAA as second highest in the country among homeowners' insurance companies with regard to claimants' overall satisfaction. Copies of the "Consumer Reports" articles are attached hereto as Exhibit "A."

3. USAA has consistently received the highest possible rating (i.e. "A+") with regard to financial position and operating performance by the A. M. Best Company ratings. A copy of the most current A. M. Best Company rating is attached hereto as Exhibit "B."

4. USAA's success is due in part to the low claims ratio history of the class of persons it services, namely, commissioned officers in the United States armed services as well as candidates for commissions.

5. USAA and co-plaintiffs are licensed to sell insurance in all fifty states. USAA's availability in all fifty states is an important factor for the highly mobile officers in the armed forces which are serviced by the USAA group of companies.

6. By letters dated July 3, 1984 and August 27, 1984, and in subsequent meetings, the Pennsylvania Insurance Department expressed the view that USAA's ownership of the USAA Federal Savings Bank in San Antonio, Texas, constitutes a violation of Section 641 of the Insurance Department Act of 1921 as amended (40 P.S. §281) (hereafter "Section 641"). Copies of these letters are attached hereto as Exhibits "C" and "D" respectively.

7. Moreover, prior to the filing of this lawsuit, the Defendant's Insurance Department advised representatives of USAA that USAA must divest the Bank or else the Insurance Department would initiate proceedings to revoke the licenses of USAA to transact business in Pennsylvania.

8. Defendant Muir, during his tenure as Acting Insurance Commissioner, has entered an order requiring one or more other insurance companies to relinquish their Pennsylvania insurance licenses by

reason of their affiliation with an out of state banking institution. A copy of such order is attached as Exhibit "E."

9. On December 24, 1984, Defendant's Insurance Department issued an administrative "Show Cause Order" alleging that USAA and co-plaintiffs are in violation of Section 641 by reason of their affiliation with the Bank. A copy of the Insurance Department's Show Cause Order is attached hereto as Exhibit "F."

10. Before filing the administrative Show Cause Order, Defendant Muir advised enforcement personnel of the Insurance Department that "A plain reading of §641 with the broad prohibition would be adopted." *See* Exhibit "G" attached hereto.

11. Administrative hearings to revoke plaintiff's insurance licenses have been rescheduled for November 14, 1985. A pre-hearing conference is scheduling for October 15, 1985. *See* Exhibit "H" attached hereto.

12. An order revoking plaintiffs' insurance licenses is substantially certain to occur following the administrative hearings in defendant's Insurance Department in view of:

(a) The past enforcement of Section 641 by the Department;

(b) The representations of the Department that USAA must divest the Bank or suffer revocation of its licenses;

(c) The service of an Administrative Show Cause Order alleging that USAA and co-plaintiffs are in violation of Section 641;

(d) The statement of the Defendant that a "plain reading of Section 641 with its broad prohibition" would be adopted;

(e) The fact of USAA's affiliation with the USAA Federal Savings Bank is admitted.

13. The Defendant's Insurance Department has never expressed any view contrary to its position that USAA and co-plaintiffs are in violation of Section 641.

14. An order revoking the licenses of USAA and co-plaintiffs will have a devastating and irreparable impact upon the business of USAA and co-plaintiffs, which will *not* be mitigated by the availability of supersedeas procedures in the state court system.

15. An order revoking plaintiffs' licenses, and the inevitable resulting publicity, will cause confusion and uncertainty in the minds of the nearly 40,000 policyholders in Pennsylvania who have chosen to insure their lives, homes, automobiles and other property with plaintiffs. Many policyholders will not understand the reason for the license revocation or the effect on them pending appeal.

16. An uncertain number of these nearly 40,000 policyholders will likely terminate their relationship with USAA and co-plaintiffs upon learning that the Pennsylvania Insurance Department has revoked plaintiffs' licenses. This will occur even with supersedeas due to the uncertain status of plaintiffs' licenses pending appeal.

17. An uncertain number of prospective policyholders will be dissuaded from insuring their lives, homes, automobiles and other property due to the uncertain status of plaintiffs' licenses pending appeal. USAA's competitors will be able to make use of

information concerning the status of these licenses in their marketing efforts.

18. It appears that USAA and co-plaintiffs will be required to notify the Insurance Departments in other states concerning any such order of revocation, despite a supersedeas. Most of these states do not have statutes similar to Section 641. Plaintiffs will be subject to damage to its outstanding reputation as well as unnecessarily increased regulatory scrutiny in these states.

19. License revocation is an extreme sanction, usually applied, if at all, only in cases where an insurance company has engaged in grossly illegal or fraudulent practices or where the company is in poor financial condition. Even with supersedeas, USAA and co-plaintiffs will suffer serious damage to their goodwill and excellent reputation in Pennsylvania and elsewhere if the licenses of these companies are revoked.

20. Only intervention by this court can prevent irreparable harm to USAA and co-plaintiffs as described above, and ensure that plaintiffs receive a fair adjudication of their constitutional rights *before* suffering such harm by reason of an order revoking plaintiffs' licenses.

/s/ WILLIAM MCCRAE

William McCrae

Sworn and subscribed
before me this 14th day
of October, 1985

/s/ LORETTA C. LANICEK

Notary Public Loretta C. Lanicek

My Commission expires 11/30/88

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

#C-64

November 8, 1985

No. 85-5662

UNITED SERVICES AUTOMOBILE ASSOC., et al.

vs.

MUIR, WILLIAM J., III, etc.

Appellants

(M.D. Civil 84-1596)

Present: HUNTER, GARTH, and MANSMANN, *Circuit Judges*.

1. Appellant's motion for injunction pending appeal, or in the alternative, for expedited argument, in which it requests that this Court enter an order enjoining appellee, pending appeal, from revoking appellant's Pennsylvania insurance licenses by reason of their federally-approved affiliation with the USAA Federal Savings Bank in San Antonio, Texas, in the above-entitled case.

Respectfully,

/s/
Deputy Clerk 7-5019

enc.
ad

The foregoing Motion for injunction pending appeal is granted. Motion to expedite is denied.

Judge Mansmann would deny the motion for injunction pending appeal.

By the Court,

/s/ JAMES HUNTER, III
Judge

Dated: November 22, 1985
ad/cc: Christopher K. Walters, Esq.
Ellis M. Saull, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED SERVICES AUTOMOBILE ASSOCIATION, ET AL.,	:	
Plaintiffs	:	
v.	:	CIVIL NO. 84-1596
WILLIAM J. MUIR, III,	:	
Defendant	:	

ORDER

And Now, this 1st day of July, 1986, upon consideration of Plaintiffs' Renewed Motion For Preliminary Injunction and Brief in support thereof, and finding that unless this order is entered irreparable injury will result to Plaintiffs before final adjudication of this matter, it is ORDERED and DECREED as follows:

Defendant William J. Muir, III, his successors in office, and his and their officers, agents, servants, employees and attorneys and those in active concert or participation with them are enjoined and restrained, pending final judgment in this case, from taking any further actions in connection with the administrative enforcement proceedings pending in the Pennsylvania Insurance Department against plaintiffs herein. This Preliminary Injunction shall take effect upon the posting by plaintiffs of security pursuant to F.R.C.P. 65(c) in the amount of $10,000.00.

By the Court:

R. DIXON HERMAN
United States District Judge

Supreme Court, U.S.
FILED
DEC 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-561

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

GEORGE F. GRODE, Insurance Commissioner
of the Commonwealth of Pennsylvania,
Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange, and
USAA CASUALTY INSURANCE COMPANY,
USAA LIFE INSURANCE COMPANY, and
USAA ANNUITY AND LIFE INSURANCE COMPANY,
Texas Stock Insurance Companies,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO BRIEF OF AMICI CURIAE

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RESPONDENTS' BRIEF IN OPPOSITION TO BRIEF OF AMICI CURIAE

ARGUMENT

Amici's Brief, like that of petitioner, ignores the fundamental premise of the Third Circuit's decision, namely, that respondents would suffer "devastating economic consequences" from abstention. They also overlook the Third Circuit's recognition of the obviously "vague claim of risks to the state from a Texas bank not doing business in Pennsylvania. . . ." 792 F.2d at 363. Instead, they focus upon an issue not even present in this case—whether states should be permitted to "limit the ability of a lending institution to sell insurance." Amici Brief at 6.

The issue here is not whether a bank may sell insurance. USAA Federal Savings Bank has never sold insurance. Instead, the issue is whether the Commissioner may penalize respondents solely for their federally approved affiliation with a bank that does not sell insurance and does no business in Pennsylvania. The amici thus fundamentally misapprehend the truly narrow issue of this case.

The amici also purportedly seek to uphold the "ability of the state to protect consumers. . . ." Amici Brief at 17-18. Their true interest, however, undoubtedly lies elsewhere. In papers filed with the District Court, these same amici stated that they "are in competition with plaintiffs [i.e. respondents] as Pennsylvania licensed insurance agents or brokers. . . ."[1] It is not difficult to see why the amici have consistently supported the revocation of USAA's licenses. If the licenses of USAA (which sells directly to officers in the armed services without insurance agents) are revoked, 40,000 policyholders who paid USAA $35,000,000.00 in premiums in 1983 will

1. Motion For Intervention Or Request For Leave To File A Brief Of An Amicus Curiae at 4 (filed February 27, 1985).

need insurance coverage. Thus, while purporting to uphold the state's interest in prohibiting unfair competitive practices, the insurance agents that comprise the amici are actually attempting, quite simply, to eliminate a substantial competitor.

Moreover, contrary to the suggestion of the amici, the Third Circuit's decision in no sense causes a "disruption" of the ability of concerned states to regulate the business of insurance within their borders.[2] *See* Amici Brief at 12-13. As noted above, the subject matter of this lawsuit is the affiliation between Texas-domiciled insurance companies and a federal savings bank in Texas. The amici have failed to mention that the Texas Board of Insurance —which is the primary regulator of Texas insurance companies such as USAA — received advance notification of the affiliation with the federal savings bank and has made no objection. *See* Affidavit of William McCrae, Supporting Plaintiffs' Motion for Summary Judgment, filed in the District Court on January 25, 1985. In short, although the amici cite various state statutes to show the alleged interest of concerned states (including Texas) in the subject matter of this action, the state having the most direct concern with the affiliation in question, namely Texas, where both USAA and its bank are located, has never objected to such affiliation.

Amici also challenge the Third Circuit's conclusion that *Pullman* abstention is not appropriate where, as here, the federal plaintiffs have presented a substantial preemption claim. Amici seek the Court's review of this aspect of the lower court's holding despite the existence of an independent ground for the decision, namely, the "devastating" consequences that would stem from abstention. In this regard, the amici attempt, but utterly fail, to establish a conflict among the circuits. At most,

2. Significantly, no one from any of these other jurisdictions has sought to participate in this case as an amicus curaie. The only amici to come forward have been Pennsylvania insurance agents that are in competition with USAA for the sale of insurance.

the amici cite several decisions involving preemption claims where courts have abstained. *Aluminum Co. of America v. Utilities Comm'n of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984); *Druker v. Sullivan*, 458 F.2d 1272 (1st Cir. 1972). But none of these cases addresses the issue at hand. None cites to any of the others, and none recognizes any sort of conflict among the circuits. Obviously, the only "conflict" found is in the eyes of the amici. Thus, the amici have presented no basis whatsoever warranting a grant of certiorari by the Court.

Moreover, as pointed out above, the substantial alternative ground of the Third Circuit's decision, namely, its findings of severe prejudice that would result from abstention, eliminates the need, if any, for review by the Court of this "perceived" conflict.

Finally, the amici suggest that USAA was "permitted to present its federal constitutional claims to the Insurance Commissioner." Amici Brief at 10 n.1. The amici neglect to mention that USAA, in the state administrative proceeding, expressly reserved its rights to have all its constitutional claims and defenses determined by the federal courts.[3] In thus reserving their rights, respondents satisfied the requirements of the Court in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 420-22 (1964). That they urged the Commissioner to interpret the statute "against the backdrop of a federal constitutional challenge" in no sense undermines their right to have their Supremacy Clause and constitutional claims determined by a federal court. *Id.* at 420.

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3. *See* Answer to Order to Show Cause at 7, filed by USAA in the Pennsylvania Insurance Department on March 1, 1985 in *In Re: United Services Automobile Association*, No. C84-12-5.

CONCLUSION

For these reasons, and the reasons set forth in respondents' Brief in Opposition to the Petition for a Writ of Certiorari, the petition should be denied, in all respects.

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December 30, 1986

Supreme Court, U.S.
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NO. 86-561

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE F. GRODE, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas Reciprocal Interinsurance Exchange, USAA CASUALTY INSURANCE COMPANY, a Texas Stock Insurance Company, USAA LIFE INSURANCE COMPANY, a Texas Stock Insurance Company, USAA ANNUITY AND LIFE INSURANCE COMPANY a Texas Stock Insurance Company,

Respondents

PETITIONER'S REPLY BRIEF

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IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1986

NO. 86-561

GEORGE F. GRODE, INSURANCE
COMMISSIONER OF THE COMMONWEALTH OF
PENNSYLVANIA,

Petitioner

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance
Exchange, USAA CASUALTY INSURANCE
COMPANY, a Texas Stock Insurance
Company, USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,
USAA ANNUITY AND LIFE INSURANCE COMPANY
a Texas Stock Insurance Company,

Respondents

PETITIONER'S REPLY BRIEF

ARGUMENT

1. Respondents misconceive the bases for both the decision of the Court of Appeals and this Court's decisions in arguing (Br. in Opp. 9-13) that abstention is impermissible under Younger v. Harris, 401 U.S. 37 (1971), because of their allegations that a license revocation order, even if stayed pending review, will cause them irreparable harm.

a. The sole basis for the Third Circuit's rejection of Younger abstention was its conclusion that the administrative proceeding was not part of the judicial process "[b]ecause the insurance department in its administrative proceedings cannot consider USSA's constitutional arguments . . . ." Pet. App. 77a. This much is clear from

Judge Becker's concurrence in which he disagrees with the majority's conclusion that respondents' claim of harm supports rejection of Pullman abstention, but nevertheless concurs in the majority's rationale for rejecting Younger abstention. Properly understood, the decision below rests on the simple conclusion that Younger abstention is inappropriate where constitutional claims cannot be decided by an administrative tribunal. This conclusion conflicts squarely with the decision in Ohio Civil Rights Commission v. Dayton Christian Schools, Inc., No. 85-488 (June 27, 1986), justifying summary reversal.

In addition to tampering with the plain rationale of the decision below, respondents virtually concede that some action by this Court is appropriate. Respondents make no attempt to dispute our main point that the decision

in Dayton Christian Schools removes the essential prop for the decision below. Instead, they characterize that decision as resting on the absence of any suggestion by the school that it would suffer irreparable harm from the administrative proceedings. Br. in Opp. 9. This ignores the argument made by the school, and rejected by the Court, that "the mere exercise of jurisdiction over it by the state administrative body violates its First Amendment rights," slip op. at 8, thereby subjecting it to irreparable harm. Gibson v. Berryhill, 411 U.S. 564 (1973), likewise does not support respondents' broad argument. The conclusion in Gibson that abstention was inappropriate rested on the principle that a biased administrative tribunal could not provide an adequate

forum for resolution of constitutional claims. Id. at 577. The Court's mention of findings that revocation of appellees' medical licenses and "attendant publicity" would cause irreparable harm was not essential to the Court's decision. Id. at 577 n.16.

Respondents stress (Br. in Opp. 15) that in some of their briefs and in affidavits submitted in support of other matters in the District Court they averred that an administrative decision tentatively revoking their insurance licenses in Pennsylvania would cause them harm. The District Court refused to credit these allegations, apparently agreeing with our submission (Pet. 43) that these claims were too speculative to support a finding of irreparable harm. In any event, assertions of this

nature almost never can be refutted since they amount to no more than a guess as to the possible reactions of unidentified individuals in response to an action with which respondents apparently have no experience. If this level of hyperbole is sufficient to defeat abstention, there is little left of the doctrine.

If respondents are correct that those faced with license revocation proceedings need only allege that they will suffer irreparable harm because of the publicity surrounding a tentative decision adverse to them, then little survives of the principle, recently reaffirmed in Dayton Christian Schools, that Younger abstention applies to administrative enforcement proceedings. Particularly where the proceedings deal with businesses, there is always the

possibility that an administrative decision will become public and may affect business dealings. Yet there is no hint in Dayton Christian Schools, Younger or any case in between that simple allegations of harm to reputation will suffice to preclude abstention.

Here, of course, as we outlined in our petition (Pet. 44-45), respondents are protected by the petitioner's agreement to withhold revocation of their license pending appeal should the administrative decision be adverse to them. If despite this agreement, the decision below can be characterized as precluding Younger abstention on the simple allegations of harm offered by respondents, then it departs substantially from the rationale underlying

Dayton Christian Schools and the caselaw since Younger. The Court should grant the petition for certiorari to review this remarkable conclusion.*

2. Respondents have failed to respond adequately to our arguments that neither self-serving allegations of potential harm to reputation from on-going state proceedings nor the presence

---

*Respondents' suggestion (Br. in App. 13) that abstention is inappropriate because of proceedings in federal court after remand is ludicrous. As respondents themselves concede, little more has occurred in the District Court following remand. Supplemental briefs have been filed on an issue briefed prior to the appeal and the District Court preliminarily enjoined the administrative proceeding. The filing of supplemental briefs adds little, if anything, to the circumstances found insufficient by the Court of Appeals to bar abstention on the notion that the federal court litigation had gone too far to permit abstention. Pet. App. 32a-33a. Of course, a preliminary injunction usually is considered at the outset of a case and its issuance cannot in itself bar abstention.

of a preemption claim preclude abstention under the rationale of Railroad Commission of Texas v. Pullman, 312 U.S. 496 (1941).

a. Respondents do not dispute our submission, endorsed by the Court of Appeals (Pet. App. 58a-59a), that their claim requires resolution of an unsettled question of state law which may moot the constitutional claims. Nor do they take issue with, or even mention, the fundamental premise of Pullman abstention-- the important interests in forestalling the friction necessarily produced when federal courts give tentative answers to unsettled questions of state law and in avoiding unnecessary adjudication of constitutional claims. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984). Both respondents

and the Court of Appeals failed to recognize that these interests must be weighed in the balance.

The District Court concluded (Pet. App. 17a-18a), quite properly, that the general interests mentioned above are reinforced in this case by the Congressional judgment in the McCarron-Ferguson Act, 15 U.S.C. §§1101-1105, that insurance regulation is a matter best left to the States. The Court of Appeals plainly focused too narrowly in rejecting the District Court's conclusion because the regulation here does not deal with the spreading of risk or the relationship between insurer and policyholder and, because banks are not part of the insurance industry. Pet. App. 71a-72a. To the contrary, the statute regulates the licensing of insurance companies, which traditionally involves strong state interests deserving

protection under McCarron-Ferguson. See SEC v. National Securities, Inc., 393 U.S. 453, 460 (1969).

It is understandable that respondents belittle these concerns, since it is presumably inconvenient for them to deal with the laws of many jurisdictions. But Congress believes that the States' interests in this area outweigh insurance company convenience.

As we pointed out earlier (supra, P. 4-5), respondents incorrectly rely on Gibson v. Berryhill, 411 U.S. 564 (1973), for the proposition that claims of irreparable harm to reputation, which are alleged to follow a tentative decision to revoke a license, preclude abstention. Gibson rested on the inadequacy of a biased State tribunal and is distinguishable, in addition,

because petitioner has promised that he will not implement any revocation of respondents' licenses until their claims have been fully adjudicated. If respondents are correct in their characterization of Gibson, it suggests that the recent decision in Dayton Christian Schools either modified Gibson or itself is of little import. This is so because an initial decision to revoke a license inevitably permits the subject to make allegations such as those advanced here. In either case, the Court should grant review to clarify the relationship between Dayton Christian Schools and Gibson.

b. Respondents seem to agree that there is at least some confusion on the question whether preemption claims are constitutional or statutory. Their statement that "Supremacy Clause claims

are often considered 'statutory' or 'nonconstitutional' . . . " (Brief in Opp. 19; emphasis added), at least implies that preemption claims can be considered constitutional claims. Respondents certainly make no effort to dispute our initial submission (Pet. 39-42) that resolution of preemption claims requires consideration of constitutional concerns.

We have pointed out in our petition the conflict among the circuits on the question whether abstention may be ordered for preemption claims and we rest on that discussion. It is worth noting, however, that respondents concede that Aluminim Co. of America v. Utilities Commission of State of North Carolina, 713 F.2d 1024 (4th Cir. 1983),

cert. denied, 465 U.S. 1052 (1984), stands for the proposition that abstention may be appropriate despite the presence in the case of a preemption claim. It is flatly incorrect for respondents to argue (Brief in Opp. 19 n.15) that the Third Circuit in this case adopted anything less than a per se rule precluding abstention in every preemption case. The Court stated, "[W]e hold that preemption claims under the Supremacy Clause are not substantial federal constitutional issues for which abstention might be appropriate." Pet. App. 67a-68a. Plainly, there is a conflict among the circuits on this important issue justifying this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 86-561

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE F. GRODE,
INSURANCE COMMISSIONER OF THE
COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange,
USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company,
USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,
USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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~~MOTION FOR LEAVE TO FILE BRIEF AND~~ BRIEF OF PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, JOHN M. ULRICH, JR., PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC., CHARLES P. LEACH, JR., PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS AND HAROLD E. ALEXANDER AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-561

GEORGE F. GRODE,
INSURANCE COMMISSIONER OF THE
COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange,
USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company,
USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,
USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,
Respondents.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, JOHN M. ULRICH, JR., PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC., CHARLES P. LEACH, JR., PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS AND HAROLD E. ALEXANDER

Pursuant to Rule 36 of the Rules of the Court, the

amici curiae seek leave to file the attached *amicus* brief in support of the petition for certiorari filed by George F. Grode, the Insurance Commissioner for the Commonwealth of Pennsylvania.

The institutional *amici* are organizations representing insurance agents who are licensed by the Pennsylvania Insurance Department and who sell insurance in Pennsylvania. The individual *amici* are themselves insurance agents licensed in Pennsylvania who sell insurance in that state.

The Pennsylvania Association of Independent Insurance Agents is composed of 1,099 independent insurance agents who are licensed to solicit fire, surety and casualty insurance contracts for insurance companies authorized to do business in Pennsylvania. John M. Ulrich, Jr., is a member of the Pennsylvania Association of Independent Insurance Agents licensed to sell fire, surety and casualty insurance in Pennsylvania.

The Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc., represents 3,133 members who are licensed to sell fire, surety and casualty insurance contracts for insurance companies authorized to conduct business in Pennsylvania. Charles P. Leach, Jr. is a member of the Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc., who sells fire, surety and casualty insurance in Pennsylvania.

The Pennsylvania Association of Life Underwriters is composed of 45 local associations that, in turn, represent 6,490 members who are licensed to sell life, accident, health and annuity insurance in Pennsylvania. Harold E. Alexander is a member of the Penn-

sylvania Association of Life Underwriters who sells life, accident, health and annuity insurance in Pennsylvania.

The *amici* have participated actively in this case by filing *amicus* briefs both in the United States District Court for the Middle District of Pennsylvania and in the United States Court of Appeals for the Third Circuit. In addition, the *amici* are intervenors in the administrative proceeding before the Insurance Commissioner of the Commonwealth of Pennsylvania that is the subject matter of this litigation. As intervenors in that proceeding, the *amici* have a particular interest in asserting their view that the federal courts should abstain from disrupting this state administrative process.

In addition, the *amici*, as persons and entities representing insurance agents in Pennsylvania, have a special interest in the basic subject-matter of this litigation, which concerns the ability of a lending institution to sell insurance to banking customers and to other persons. The *amici* have traditionally opposed the entry of banks and similar financial institutions into the insurance business and they will be directly affected by the eventual outcome of this litigation and the state administrative proceeding.

The parties, by letters dated November 25 and 26, 1986, have consented to the filing of the attached *amicus* brief.* Such filing will not delay the hearing in this case, but will, we believe, assist the Court in assessing crucially important issues.

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* The letters of consent have been lodged with the Clerk of the Court.

CONCLUSION

For the foregoing reasons, the Court should grant leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether refusal by a federal court to abstain from jurisdiction, under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), on the sole basis that a state administrative tribunal has no power to address constitutional claims comports with principles of federalism and with this Court's decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, — U.S. ___, 106 S.Ct. 2718 (1986).

2. Whether the exercise of a federal court's equitable discretion to abstain from jurisdiction is appropriate where a state administrative proceeding is considering a difficult and unsettled issue of state law that, if resolved in favor of the regulated entity, would eliminate the need for adjudication of that entity's constitutional claims and where the subject matter of regulation—the business of selling insurance—has long been recognized to be important to the states.

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INTRODUCTION

This case concerns the ability of the Commonwealth of Pennsylvania to regulate the activities of a state-licensed insurance company through administrative and judicial procedures that provide the insurance company with ample opportunity to proffer its view of the scope of state regulation and the validity, under the United States Constitution, of that regulation. The Third Circuit refused to abstain from the exercise of federal jurisdiction over federal constitutional challenges to the state proceeding. The court of appeals decision represents an important -- and erroneous -- view of abstention. If left to stand, it would, as a practical matter, impede the ability of states across the nation to protect consumer interests through the regulation of state-licensed insurance companies.

INTEREST OF THE AMICI

The interest of the *amici* is set forth in the motion for leave to file this brief.

STATEMENT OF THE CASE

1. The respondent United Services Automobile Association ("USAA"), a Texas reciprocal interinsurance exchange, has been licensed by the Commonwealth of Pennsylvania to sell insurance in Pennsylvania since 1950. In April, 1983, a wholly-owned subsidiary of USAA was authorized by federal agencies to own and operate a federal savings bank located in San Antonio, Texas. As the owner of a federal savings bank, USAA became a savings and loan holding company.

2. On July 3 and August 27, 1984, the Pennsylvania Insurance Department notified USAA that, pursuant

to Section 641 of the Pennsylvania Insurance Department Act of 1921, as amended, it must divest the savings bank or risk revocation of its authority to sell insurance in Pennsylvania. Section 641(b) provides, in part, that "[n]o . . . savings and loan holding company or any affiliate thereof, may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this state" except in circumstances not relevant to this case. On October 29, 1984, USAA disputed the suggestion that Section 641 prohibits its ownership of a savings bank. Relying on other sub-sections of the statute, USAA contended that Section 641 bars only the affiliation of an insurer with a bank that is doing business in Pennsylvania and USAA represented that its savings bank did not conduct business in Pennsylvania.

3. On November 27, 1984, USAA and three of its subsidiary insurance companies filed an action in the United States District Court for the Middle District of Pennsylvania seeking declaratory and injunctive relief to prevent the Insurance Department from basing enforcement action on Section 641. USAA alleged that application of Section 641 to it would violate the Commerce Clause, the Supremacy Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

4. On December 24, 1984, the Insurance Department issued an Order to Show Cause that directed USAA to appear at an administrative hearing that would determine the applicability of Section 641. On the same day, the Insurance Department requested that the district court abstain from considering any of USAA's constitutional claims.

5. On September 30, 1985, the district court ruled for three reasons that abstention would be proper. *First*, the district court applied the doctrine of *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941). It concluded that the scope of Section 641 is an unsettled question of law and that resolution of the statutory question might obviate the need for adjudication of USAA's constitutional claims. The district court rejected the assertion that USAA would suffer untoward harm if state administrative proceedings were permitted to go forward because state "procedures will assure U.S.A.A. that, before its license is revoked and it is prohibited from doing business in Pennsylvania, it will have the opportunity to be heard on both the state law issue and the constitutional challenges" in the Pennsylvania state courts. Pet. App. at 19a-20a.

Second, the district court held that abstention was proper under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), which is applicable where a federal court faces difficult questions of state law bearing on important state issues. Pet. App. at 23a-24a. The district court held that the standards of *Burford* were satisfied because "the policies behind § 641 and designed to be implemented by § 641 may have everything to do with the relationship between insurers and insured," *id.*, at 28a, and because enactment of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, demonstrates the federal policy that " 'regulation of the insurance industry be left to the individual states.' " *Id.*, at 25a, quoting *Levy v. Lewis*, 635 F.2d 960, 963 (2d Cir. 1980).

Third, the district court concluded that the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), required

abstention. The district court interpreted the *Younger* doctrine to apply to circumstances " 'where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests.' " *Id.*, at 31a, quoting *Williams v. The Red Bank Board of Education*, 662 F.2d 1008, 1017 (3d Cir. 1981). In the district court's view, the *Younger* doctrine was applicable because (i) no proceedings of substance had taken place in federal court on the merits of USAA's constitutional claims, *id.*, at 32a-33a, (ii) the state had a weighty interest in pursuing the administrative proceeding, *id.*, at 34a-35a, and (iii) the state court system was available to review any administrative decision adverse to USAA and to consider any of USAA's federal constitutional claims. *Id.*, at 35a-36a.

6. On June 6, 1986, the United States Court of Appeals for the Third Circuit reversed each of the district court's holdings. The court held that *Pullman* abstention was inappropriate because (i) a state decision to revoke USAA's license, even if stayed, might cause USAA serious financial harm, and (ii) claims that a state law is preempted by federal law "are not substantial federal constitutional issues for which *Pullman* abstention might be appropriate," *United States Automobile Ass'n v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986). The court refused to apply *Burford* because, in its view, (i) Section 641 does not involve the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1012, and (ii) the regulatory scheme involved is not complicated. Finally, the court rejected the district court's application of the *Younger*

doctrine because the Insurance Commissioner would not, under state law, be permitted to pass upon the validity of USAA's federal constitutional claims.

In a separate concurrence, Judge Becker disagreed with one aspect of the court's *Pullman* reasoning. In his view, USAA had not shown that the injury it would likely suffer from abstention was so great as to require immediate federal consideration of its constitutional claims.

7. On October 3, 1986, pursuant to an extension of time granted by this Court, the petitioner, the Insurance Commissioner of the Commonwealth of Pennsylvania, timely filed a petition for a writ of certiorari. On October 23, 1986, this Court granted a motion extending until December 3, 1986, the time in which a response to the petition for certiorari must be filed. Pursuant to Rule 36.1 of the Rules of the Court, the latter extension of time permits this *amicus* brief to be filed on or before December 3, 1986.

SUMMARY OF ARGUMENT

The *Younger* doctrine, first enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), requires federal courts to abstain from jurisdiction where federal claims can be presented in on-going state judicial proceedings that affect important state interests. The Third Circuit refused to apply *Younger* to this case on the sole ground that the state Insurance Commissioner is not empowered to decide federal constitutional claims in an administrative proceeding. This Court's subsequent decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, ___U.S. ___, 106 S.Ct. 2718 (1986), establishes, however, that *Younger* is fully applicable where, as here, a state agency is permitted to con-

strue its statutory mandate in light of federal constitutional concerns and where federal constitutional claims may be presented to state courts that review the state administrative decision. Accordingly, the Court may wish to grant certiorari, vacate the lower court decision, and remand for reconsideration in light of the *Dayton Christian Schools* decision. Alternatively, the court of appeals decision may be reversed summarily.

For independent reasons, plenary review of the Third Circuit decision would also be appropriate. At least 24 states and territories have statutes that, like the Pennsylvania statute in controversy, limit the ability of lending institutions to sell insurance. These laws represent judgments of local legislatures that consumer interests would be best protected if banking customers are not subject to possible coercion arising from the dual marketing of financial and insurance products. But the ability of states to apply their legislative policy to specific factual circumstances will be needlessly hampered if the Third Circuit's decision is left intact. Fundamental principles of federalism require the conclusion that a federal court should abstain from the exercise of jurisdiction where, as here, a state would be denied the first opportunity to interpret the reach of a regulatory statute, where the subject-matter of regulation (the sale of insurance) has traditionally been left to the states, and where an interpretation of state law in favor of the regulated entity would eliminate the need for constitutional adjudication of any kind.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI, VACATE THE LOWER COURT DECISION, AND REMAND THIS CASE TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This case presents an obvious circumstance in which certiorari should be granted, the decision below vacated, and the case remanded to the Third Circuit for consideration in light of an intervening decision of this Court. Here, the Court's recent decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, ___U.S. ___, 106 S.Ct. 2718 (1986), demonstrates conclusively that the lower court erred by refusing to abstain from the exercise of federal jurisdiction.

In *Younger v. Harris*, 401 U.S. 37 (1971), this Court established that "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 (1984). The Third Circuit refused to apply *Younger* abstention, however, on the sole ground that the on-going administrative hearing before the state insurance commissioner was not a judicial proceeding. *United Services Automobile Ass'n v. Muir*, 792 F.2d 356, 365 (3d Cir. 1986). In the court's view, a state administrative proceeding is part of its judicial process, for *Younger* purposes, "only if it provides an adequate opportunity to raise constitutional challenges." *Id.* at 365. Because "the insurance department in its administrative proceedings cannot consider USAA's con-

stitutional arguments, its administrative proceedings are not part of Pennsylvania's judicial process." *Id.*, at 366.

On June 27, 1986 -- twenty-one days after the Third Circuit's decision -- this Court repudiated the lower court's reasoning. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., supra*, concerned a claim of sex discrimination filed with a state civil rights commission by a school teacher who asserted that her employer had unlawfully terminated her employment. On First Amendment grounds, the school, which was operated as a religious academy, sought a federal-court injunction barring the state administrative proceeding.

This Court held that the *Younger* doctrine required the federal courts to abstain from considering the school's constitutional claim. In so holding, the Court rejected as insufficient the school's assertion that *Younger* was inapplicable because "the administrative proceedings do not afford the opportunity to level constitutional challenges against the potential sanctions for the alleged sex discrimination." 106 S.Ct. at 2724. *First*, the Court recognized that state administrative agencies asked to interpret the reach of state statutes may consider the implications of federal constitutional doctrine even if they cannot render a decision on the merits of the federal constitutional claims. As the Court explained, "it would seem an unusual doctrine, and one not supported by the cited [state] case, to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles." *Id. Second*, the Court emphasized that state administrative processes cannot be disconnected artificially from the state ju-

dicial proceedings that follow on their heels. In other words, "it is sufficient . . . that constitutional claims may be raised in state court judicial review of the administrative proceeding." *Id.*

Both parts of the Court's reasoning are satisfied in this case. The state administrative proceeding is designed precisely to determine whether Section 641 of the Pennsylvania Insurance Department Act of 1921, as amended, is applicable to insurers that, like USAA, own banking institutions located outside the borders of Pennsylvania. In its administrative papers, USAA has expressly presented its multiple federal constitutional contentions and has argued that the Insurance Commissioner must "consider the constitutionality of Section 641 as applied to USAA, and . . adopt the construction that supports it's [sic] constitutionality." Respondents' Post-Hearing Brief at 19, *In Re: United Services Automobile Ass'n, et al.*, No. C84-12-5 ("Respondents' Post-Hearing Brief"). The Insurance Department has responded to USAA's argument by vigorously defending Section 641 on federal constitutional grounds. *See* Reply Brief of the Insurance Department, *In Re: United Services Automobile Ass'n, et al.*, No. C84-12-5 ("Insurance Department Reply Brief"). The Insurance Commissioner is well positioned, therefore, to "construe [his] own statutory mandate in the light of federal constitutional principles." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S.Ct. at 2724.

In addition, USAA's constitutional contentions may be presented to the Commonwealth Court or subsequently to the Pennsylvania Supreme Court on review of the Insurance Commissioner's application of Section 641. In the event that the Insurance Commis-

sioner revokes or suspends USAA's license, USAA has an absolute right to judicial review, *see* 2 Pa.Cons.Stat. §§ 724, 763, which includes review of its federal constitutional claims by the state courts. *See* 2 Pa.Cons.Stat. §§ 703(a), 704. In addition, USAA would be free to appeal an adverse state-court decision to this Court. *See* 28 U.S.C. § 1257(2). Both of the bases of this Court's application of *Younger* in the *Dayton Christian Schools* case have, therefore, been met here.[1]

In sum, this Court's decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.* removes the sole basis for the lower court's legal conclusion that the *Younger* doctrine is inapplicable. Summary reversal of the Third Circuit decision would, there-

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[1] In his petition for certiorari, the Insurance Commissioner does not take issue with the lower court's understanding that, under Pennsylvania law, administrative agencies cannot rule that a statute violates the federal constitution. Nonetheless, it should be noted that USAA has consistently been permitted to present its federal constitutional claims to the Insurance Commissioner. Thus, USAA has argued in the regulatory proceeding that Section 641, if applied to its activities, would violate the Supremacy Clause, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Commerce Clause. *See* Respondents' Pre-Hearing Memorandum, Exhibit B (Statement of Legal Issues in Dispute), *In Re: United Services Automobile Ass'n*, No. C84-12-5; Respondents' Post-Hearing Brief at 20-32. The Insurance Department has responded in that forum by defending "the constitutionality of Section 641 and the Department's enforcement action." Insurance Department Reply Brief at 2; *see id.*, at 2-17. Even if the Insurance Commissioner is not permitted to decide the merits of the federal constitutional claims, the extensive briefing of those issues prior to the entry of an enforcement order will assist any court that is subsequently required to review the constitutionality of the Insurance Commissioner's actions.

fore, be appropriate. *See, e.g., Wyrick v. Fields*, 459 U.S. 42 (1982) (*per curiam*); *id.*, at 50 (Marshall, J., dissenting) (Summary reversal "should be reserved for situations in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error.") (footnote omitted). Because the lower court decision pre-dates the *Dayton Christian Schools* decision, however, this Court may wish instead to grant, vacate, and remand for further consideration in light of that decision.

II. THIS CASE PRESENTS IMPORTANT INTERESTS OF FEDERALISM THAT REQUIRE PLENARY HEARING AND DECISION BY THIS COURT

The Third Circuit's conclusion that the merits of this case should be considered by a federal court rests on two separate strands of the abstention doctrine. The Third Circuit held that the facts of this case fail to satisfy either the rule of *Younger v. Harris*, 401 U.S. 37 (1971), or the standards for the invocation of equitable abstention established in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

These abstention doctrines rest on the same basic principles of federalism. A federal court that considers important and unsettled questions of state law must take care not to nullify the state's role in interpreting and enforcing its own legislative policies. Abstention doctrines serve the interests of federalism by recognizing that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. at 44. Considerations of federalism

therefore counsel the federal courts to avoid "needless friction with state policies." *Railroad Comm'n v. Pullman Co.*, 312 U.S. at 500-01; *see Burford v. Sun Oil Co.*, 319 U.S. at 332-33.

This case is important precisely because the lower court decision unnecessarily displaces state authority and state discretion. The Third Circuit opinion disregards the teachings of this Court -- and the basic tenets of federalism -- by taking from the Commonwealth of Pennsylvania the first opportunity to interpret the reach of a statute, the scope of which is at issue in an ongoing administrative proceeding, the subject-matter of which is an industry traditionally regulated by the states, and the resolution of which may moot the need for the consideration of federal constitutional issues by any court, state or federal.

The potential effect of the lower court decision is not confined, however, to a single state. At least twenty-four other states or territories limit in some manner the ability of lending institutions to sell insurance.[2] Those statutes represent a broad consensus on the state level that the public interest will be best served if banking and similar institutions do not also engage in unrestricted insurance activities.[3] Applica-

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[2] *See* Appendix (Relevant Excerpts From State Codes).

[3] *See, e.g.*, Ark. Stat. Ann. § 66-2810(2)(e) (authorizing the Insurance Commissioner to promulgate regulations "in order to effectuate the purposes of this section, which are to help maintain the separation between lending institutions and the insurance business and to minimize the possibilities of unfair competitive and deceptive practices by lending institutions or their subsidiaries or affiliates affecting agents, brokers or the public."); Colo. Rev. Stat. § 10-2-221(5) (authorizing the commissioner to promulgate "such regulations as are necessary to

tion of the lower-court decision in this case, however, would deprive each of those states of the initial opportunity to interpret the scope of their statutes because any insurer subject to possible regulation would be able to displace state authority merely by proceeding to federal court to seek an injunction. Such disruption of the state's ability to refine its laws through application of statutory requirements to specific circumstances is inconsistent with our federal system and is worthy of this Court's attention.

The importance of the Third Circuit's decision is not confined, however, to the impact of its ruling on states across the nation. Its interpretation of the abstention doctrine raises three separate issues, each of which deserves plenary decision by this Court. *First*, and as explained above, the Third Circuit's application of the *Younger* doctrine is in direct conflict with this Court's ruling in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, *supra*.

Second, the Third Circuit's application of *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), is in direct conflict with the holdings of other courts of appeal. The *Pullman* doctrine instructs federal courts to "abstain from decision when difficult and unsettled questions of state law must be resolved be-

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maintain the separation between banks or bank holding companies and the insurance business and to promote fair trade practices."); Ga. Code Ann. § 33-3-23 (1986) (authorizing the Commissioner of Insurance "to promulgate rules and regulations in order to effectuate the purposes of this Code section, which are to assist in the maintenance of the separation between lending institutions and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions, agents and brokers.").

fore a substantial federal constitutional question can be decided." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984). The Third Circuit ruled that USAA's motion for summary judgment did not raise a "substantial federal question" because "preemption problems are resolved through a nonconstitutional process of statutory construction." 792 F.2d at 363.[4]

The federal circuit courts are deeply divided on the issue of whether a preemption claim is subject to the *Pullman* doctrine. The cases can be classified into three distinct categories: (i) The Third Circuit, in the decision below, and the Ninth Circuit, *see Knudsen Corp. v. Nevada State Diary Comm'n*, 676 F.2d 374 (9th Cir. 1982), have held that, in all circumstances, preemption claims are not subject to equitable abstention, (ii) The First Circuit has applied *Pullman* abstention to a complaint filed in federal court that raised only a preemption claim, without any suggestion that preemption claims might ever be exempt from abstention, *Druker v. Sullivan*, 458 F.2d 1272 (1st Cir. 1972), and (iii) The Fourth Circuit has held that federal courts may abstain from consideration of preemption claims, while suggesting that "abstention is inappropriate where the federal government has

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[4] The lower court recognized that USAA had raised other constitutional claims in its complaint, but decided the *Pullman* issue without reference to those claims because the preemption ground was the sole basis for a motion for summary judgment filed by USAA. *Id.*, at 364. The *amici* know of no support for the proposition that application of the abstention doctrines should depend on a plaintiff's choice of which constitutional issues to present for summary judgment and which to hold back for future consideration by a district court. The Third Circuit's ruling would permit obvious, and inappropriate, manipulation of a federal court's application of abstention doctrines.

preempted the field . . . or where there is a direct, facial conflict between state and federal statutes. . . ." *Aluminum Co. v. Utilities Comm'n of North Carolina*, 713 F.2d 1024, 1030 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

This conflict between the circuits raises an important issue about the nature of preemption claims and the purpose of the abstention doctrine. The Third Circuit distinguished claims under the Supremacy Clause from other constitutional claims on the ground that preemption analysis only requires application of the "nonconstitutional process of statutory construction." 792 F.2d at 363. But, in fact, preemption analysis demands much more. As this Court has explained, a claim under the Supremacy Clause requires a court to consider (i) whether "Congress evidences an intent to occupy a given field," or (ii) whether state regulation "actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or [when] the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress . . . ." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). In essence, therefore, a federal court is required to survey carefully both federal and state law, to discover the purpose behind federal regulation, and to determine whether state policy has been displaced, even implicitly, by federal action.

The resemblance between this analysis and principles of abstention is obvious. Both doctrines insure " 'scrupulous regard for the rightful independence of state governments,' " *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. at 501, quoting *Di Giovanni v. Camden Ins. Ass'n*, 296 U.S. 64, 73 (1935), while

recognizing the need for the decision-making process of federal institutions to take precedence in appropriate circumstances. This Court should resolve the conflict among the circuits by holding that challenges to state law based on the Supremacy Clause are exactly the type of controversies to which *Pullman* abstention may be correctly applied.[5]

Third, the Third Circuit's application of the equitable abstention doctrine as applied by this Court in *Burford v. Sun Oil Co.*, *supra*, raises an important question concerning the extent to which Congress has permitted the states to regulate the business of insurance.[6] The *Burford* decision is appropriately applied by federal courts to abstain where necessary to avoid needless conflict with a state regulatory scheme

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[5] Another aspect of the Third Circuit's *Pullman* analysis also presents a question worthy of the Court's attention. The lower court held that USAA would be unfairly harmed if the state proceeding went forward, even if any license suspension or revocation were stayed pending judicial review. 792 F.2d at 362-63. But the so-called harms identified by that court would have "no legal force or practical effect upon [USAA's] business other than the disruptions that accompany any major litigation." *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980). The Third Circuit's analysis would, therefore, preclude application of *Pullman* in virtually any case in which a for-profit corporation challenges the constitutionality of state enforcement action.

[6] The questions presented by the petitioner in his petition for certiorari refer only to the *Younger* and *Pullman* cases. The *Burford* question is, nonetheless, a "subsidiary question" that is "fairly included" in the questions presented. Supreme Court Rule 21.1(a). As the *Burford* Court itself recognized, its exercise of equitable discretion was based squarely on the earlier decision in *Pullman*. *See* 319 U.S. at 331-33. Thus, *Burford* simply represents one facet of the equitable abstention doctrine set forth in *Pullman*.

that serves important state concerns. *See Alabama Public Service Comm'n v. Southern Ry.*, 341 U.S. 341, 348-50 (1951). The Third Circuit devalued the importance of the state interest in regulating the business of insurance by concluding that Section 641 is not protected from federal regulation by the McCarran-Ferguson Act because restrictions on the sale of insurance by lending institutions do not regulate the "business of insurance." 15 U.S.C. § 1012.

This Court has recognized, however, that "the licensing of companies and their agents . . . [is] also within the scope of the statute." *SEC v. National Securities, Inc.*, 393 U.S 453, 460 (1969); *see also Robertson v. California*, 328 U.S. 440, 459 (1946). That conclusion follows from the fundamental purpose of McCarran-Ferguson: "to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218 n.18 (1979). The Third Circuit's decision flies in the face of congressional intent by depriving the state of the initial chance to determine whether, as USAA claims, Section 641 impermissibly burdens commerce. More importantly, the Third Circuit's construction of McCarran-Ferguson adversely affects the state's ability to contend (when the preemption question is reached) that its regulation is exempt from federal interference.

The import of the Third Circuit decision, therefore, is to obstruct the ability of the Commonwealth of Pennsylvania to regulate the permissible activities of insurance companies licensed to do business in that state. It thus hampers the ability of the state to pro-

tect consumers from undue economic concentration that results in higher prices and unfair selling tactics. But the effect of the Third Circuit's decision is much broader. Because, as noted above, at least twenty-four states and territories limit the ability of financial institutions to sell insurance, the lower court decision poses a major threat to the continuation of state regulation in many jurisdictions. For this reason, plenary review of the Third Circuit decision is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

RELEVANT EXCERPTS FROM STATE CODES

Arizona

Ariz. Rev. Stat. Ann. § 6-465(A)(1986)

> "An association operating under this chapter and any other association or corporation, under whatever laws organized, except an association or corporation operating an insurance business, other than title insurance . . . may merge into one association operating under this title."

Arkansas

Ark. Stat. Ann. § 66-2810(2) (1981 Supp.)

> "The Commissioner shall not issue any Agent's license to any lending institution, . . . in any municipality within this state which has a population that exceeds five thousand [5,000], according to the latest United States decennial census.
>
> (a) Provided, however, such lending institution, . . . may [*inter alia*] be issued a license:
>
> (i) to sell mortgagor's decreasing term life insurance, mortgagor's accident, health and sickness insurance, credit life insurance, credit accident and credit health and accident insurance."

California

42A Cal. Ins. Code § 1643 (West 1986)

> "No bank, [and] no bank holding company . . . may be licensed as an insurance agent or broker or act as an agent or broker for insurance . . ., except that a bank or a bank holding company subsidiary, or affiliate of a bank may be issued a license to act as a life and disability agent limited to the transaction of credit life and disability insurance . . . This section shall not apply [*inter alia*] to any bank or bank holding company which, under the authorization of the Federal Reserve Board, had prior to January 1, 1976, a subsidiary or affiliate licensed to sell insurance (except that subsequent authorization to expand such activities shall be subject to this section), or to any bank holding company owning a state-chartered bank which had, prior to January 1, 1976, a subsidiary or affiliate licensed to sell insurance."

Cal. Fin. Code § 1208 (West 1968)

> "A commercial bank located in a place the population of which does not exceed 5,000 persons . . . may act as agent for fire, life, or other insurance company authorized to do business in California . . . "

Colorado	Colo. Rev. Stat. § 10-2-221(2) (1983) "No bank or bank holding company, nor any subsidiary, affiliate, or employee thereof, shall be licensed or admitted, directly or indirectly, as an insurer or be licensed to sell insurance in this State . . . , except that [*inter alia*]: (a) A bank or a bank holding company . . . may be licensed to sell credit life and credit accident and health insurance . . . (b) A bank holding company . . . , in a municipality or trade area, the population of which does not exceed five thousand . . . may be licensed to sell insurance . . . (c) Any employee of a bank or bank holding company licensed to sell insurance . . . on July 1, 1977, may continue to do so . . ." § 11-6-101(2) (1983) "[A]ny bank, located and doing business in any community the population of which does not exceed five thousand inhabitants, . . . may, . . . act as the agent for any fire, life, or other insurance company . . ."

Connecticut	Conn. Gen. Stat. Ann. § 38-72a (West 1986) "(b) No license authorizing the sale of fire and casualty insurance shall be issued . . . to (1) a lending institution, or (2) a bank holding company . . . [except for licenses issued as of October 1, 1973]"
Florida	Fla. Stat. Ann. § 626.988(1)(a) (West 1984) "This definition [of financial institution] shall not . . . include [*inter alia*] any financial institution which has been granted an exemption by the Board of Governors . . . pursuant to § 4(d) of the Federal Bank Holding Company Act . . . . Specifically excluded [from this prohibition] . . . is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 . . ." § 626.988(2) (West 1984) "No insurance agent . . . licensed by the department of insurance . . . who is associated with, . . . a financial institution shall engage in insurance agency activities as an employee . . . of a financial institution agency" [with certain exceptions set forth in the statute].

§ 626.988(2)(a) (West 1984)
"[A]n insurance agent . . . who is affiliated with . . . a bank holding company subsidiary, . . . may engage in insurance activities . . ., but only to the extent that such activities are directly related to extensions of credit . . . [S]uch agent may offer decreasing term life insurance."

Georgia

Ga. Code Ann. § 33-3-23 (1986)
"(b) No lending institution [or] bank holding company, . . . may directly or indirectly be licensed to sell insurance in any municipality within this state which has a population which exceeds 5,000 . . . except that [*inter alia*] a lending institution . . . may engage in underwriting . . . credit life insurance and credit accident and sickness insurance . . ."
"(f) [and statutory restrictions] . . . shall [not] apply to any lending institution . . . which was a subsidiary or affiliate of either of the foregoing on January 1, 1974 . . ."

Iowa

Iowa Code Ann. § 524.710 (West 1970)
"No officer or employee of a state bank shall: . . . (3) [e]ngage, directly or indirectly, in the sale of any kind of insurance . . ."

Kentucky	Ky. Rev. Stat. Ann. § 287.030(4) (Michie 1986) "No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except [*inter alia*] credit life insurance [and] credit health insurance . . ."
Louisiana	La. Rev. Stat. Ann. § 22:1454 (West 1978) "No domestic insurer shall . . . engage in any banking business whatsoever."
Maine	Me. Rev. Stat. Ann. tit. 24-A, § 1514-A(2)(1983) "No financial institution . . . may be licensed as an insurance agent. . . . [with exceptions noted in the statute]."
Massachusetts	Mass. Gen. Laws Ann. Ch. 175, § 174E (West 1986) "No such [insurance] license . . . shall be issued to any bank unless such bank held such license . . . prior to October eleventh, nineteen hundred and seventy-two. . . ."

Mississippi	Miss. Code Ann. § 83-17-229 (1986) "No lending institution . . . or holding company located in any municipal corporation of this state which has a population of seven thousand (7,000) persons or more . . . may directly or indirectly be licensed to sell insurance . . ., however, . . . the subsidiary or affiliate of a lending institution . . . may be licensed to sell credit life, health and accident insurance . . ."
Nebraska	Neb. Rev. Stat. § 44-392 (1986) "It shall be hereafter unlawful for any bank . . . located in any incorporated city in this state having a population of two hundred thousand or over, to sell, write or solicit any kind or form of insurance . . ."
Nevada	Nev. Rev. Stat. Ann. § 662.235(2) (Michie 1971) "No bank shall act as agent for any insurance company." § 683A.110(2)(1971) "No bank or bank holding company . . . may directly or indirectly be licensed to sell insurance in this state except as to credit life and health insurance and credit property insurance . . ."

New Hampshire

N.H. Rev. Stat. Ann. § 384:16-b(II) (1983)

> "[N]o bank or banking association . . . shall directly or indirectly engage in . . . the sale or servicing of policies of property or casualty insurance . . .; insurance consulting activities or performance of any other activity as insurance agents or brokers . . ."

New York

N.Y. Ins. Law § 2501 (McKinney 1985)

> "(a) No insurance agent or broker . . . who is owned or controlled, directly or indirectly, by a bank shall negotiate any policy of insurance covering real or personal property which is the subject matter of, or security for, a loan or extension of credit made by the bank . . ."

Ohio

Ohio Rev. Code Ann. § 3911.01 (Anderson 1985)

> "The business of life insurance, or life and accident insurance, in this state, shall not be in any way transacted by any company, partnership or association which in this state, or in any other state or country, . . . does a banking or any other kind of business in connection with insurance."

Puerto Rico	P.R. Laws Ann. tit. 26 § 304 (1985) "To qualify . . . to transact insurance in Puerto Rico an insurer must: (7) [c]omply with the following additional qualification []: (a) [t]hat no bank, . . . except companies engaged exclusively in the financing of individual insurance premiums . . . [can] own or control a substantial part of the shares of the insurer."
	§ 307 "No person shall be authorized as an insurer in Puerto Rico if he engages in any business other than the insurance business . . ."
Rhode Island	R.I. Gen. Laws § 27-3-47 (1979) "Except for [*inter alia*] the sale of credit life insurance [and] credit accident and health insurance . . . no license to act as an [insurance] agent . . . shall be issued to . . . a bank, savings bank or trust company . . . a bank holding company [or] any other individual, corporation, partnership or association authorized to take deposits and to make loans of money. . . ."

Tennessee	Tenn. Code Ann. § 56-6-201 (1986) "(a) No insurance agent . . . who is owned or controlled directly or indirectly or who is employed by a bank holding company . . . shall negotiate any policy of insurance other than [*inter alia*] credit life insurance [and] credit accident and health insurance . . ."
Texas	Tex. Ins. Code, Art. 21.07-3, Sec. 5(h) (1981) "Except as provided herein, [an insurance] licensee that qualifies under this section may not be owned in whole or in part, either directly or indirectly, by a state bank, national bank, or bank holding company. . . . This subsection shall not apply to any licensee that on June 1, 1981, is owned by a state bank, national bank, or bank holding company . . .

so long as ownership continues; nor shall this subsection apply to a licensee for which on July 15, 1981, a state bank, national bank, or bank holding company . . . filed an application for prior approval of ownership . . ."

Vermont

Vt. Stat. Ann. tit. 8, § 4811 (1984)
"(a) No lending institution may directly sell, negotiate or service insurance in this state, except [*inter alia*] credit or mortgage life insurance . . ."

Virginia

Va. Code Ann. § 38.2-205 (1986)
"A. No lending institution, [or] bank holding company . . . doing business in this Commonwealth, or any officer or employee, excluding a director of any of these institutions, shall be directly or indirectly licensed to sell insurance if located in any county, city or town in this Commonwealth that has a population exceeding 5,000 persons . . ."

"C. Nothing in this section shall apply to (i) any lending institution . . . licensed to sell insurance . . . on January 1, 1977 . . ."